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First Flower - The Earliest American Law Reports and The Extraordinary Josiah Quincy Jr. (1744-1775)

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First Flower—The Earliest American Law Reports and The Extraordinary Josiah Quincy Jr. (1744-1775)*

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I. INTRODUCTION

We can all debate for generations the conflicting priorities of legal history, but one fact remains: Whether you are a "structuralist," a "contextualist," a postmodern "textualist," or a "new historicist," you will always welcome improved access to original sources.[1] In no area is this more important than in the history of our colonial legal systems, where a few major archives, such as *The Adams Papers*, have dominated most

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† J. Donald Monan University Professor and Former Dean, Boston College Law School; Visiting Professor, Harvard Law School; Reporter, Committee on Rules of Practice and Procedure, Judicial Conference of the United States. I would particularly like to thank my most able research assistants, James Dimas and Thomas J. Murphy for all their help, my talented students, Jane G. Downing and Natalia Fekula, for their excellent work in transcribing Quincy's manuscripts, and Dean Aviam Soifer, for his constant support and encouragement. Of course, my co-editors Mark Walsh and Neil York have been invaluable.

1. William W. Fisher III, has brilliantly described the importance of at least the latter three schools of intellectual history to modern legal historians in his splendid, but yet unpublished paper, Texts and Contexts: The Application to Legal History of the Methodologies of Intellectual History. William W. Fisher III, Text and Contexts: The Application to Legal History of the Methodologies of Intellectual History (Apr. 19, 1996) (unpublished manuscript, on file with author). Fisher observes:

> While the Textualists typically concentrate on "great" or canonical texts (read noncanconically) and while the Contextualists typically seek to identify the common themes and assumptions in the writings of the members of a discursive community (and then interpret individual texts in light of those assumptions), the New Historicists typically focus on small events or anecdotes (often ones they have discovered serendipitously) that they believe are suggestive of the "behavioral codes, logics, and motive forces controlling a whole society . . . ."

Id. (quoting THE NEW HISTORICISM (H. Aram Veeser ed., 1989). As will be seen, *Quincy's Reports* provides grist for all these mills.

secondary writing.[2]

Thus, in collaboration with Mark Walsh of the Massachusetts Bar and Professor Neil L. York of Brigham Young University, I have set out to prepare a new edition of one of the most important original sources about colonial American law, *Quincy's Reports*. *Quincy's Reports* was prepared by Josiah Quincy Jr. (1744-1775), and covered cases in the Massachusetts Superior Court of Judicature between 1761 and 1772, albeit in very irregular chunks, and with some unrelated cases thrown in. It can be fairly described as the earliest of all American law reports.[3]

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2. *See generally* Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, *in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, at 359 (Daniel R. Coquillette ed., Robert J. Brink, Catherine S. Menand, ass't eds., 1984).

3. *See* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 (Boston, Little, Brown & Co. 1865) [hereinafter QUINCY'S REPORTS]. *Quincy's Reports* were not published until 1865, when they appeared in an edition prepared by his great-grandson, Samuel M. Quincy. *Id.* Arguably, the earliest American law reports were either Ephraim Kirby's *Connecticut Reports* or Francis Hopkinson's *Judgments in Admiralty in Pennsylvania*, both published in 1789. Charles Warren argued for Kirby, and John W. Wallace for Hopkinson. *See* JOHN WILLIAM WALLACE, THE REPORTERS 571 n.2 (Boston, Soule and Bugbee 1882) (touting Hopkinson as first author of American law reports); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 328 (1980) (describing Kirby as writer and publisher of first American law reports); *see also* Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 53 (1981) (discussing unresolved debate surrounding identity of first author). *Compare* Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 297, 297 (1972) (crediting Kirby with publishing first reports), *with* Wilfred J. Ritz, *The Francis Hopkinson Law Reports*, 74 L. LIBR. J. 298, 299 (1981) (asserting Hopkinson wrote "first true American law report"). An excellent new study of the Reports of the Supreme Court of the United States exists as well. *See* MORRIS L. COHEN & SHARON HAMBY O'CONNOR, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES 1-22 (1995) (discussing importance of and rationale for reporting). One might also argue that Alexander Dallas' *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania* stands as the earliest report because, while it was published a year after both *Kirby* and *Hopkinson*'s *Reports* in 1790, it contains cases as old as 1754. *See* Anonymous, 1 U.S. (1 Dallas) 1 (1754) (limiting extension of statute of frauds and perjuries in province of Pennsylvania); COHEN & O'CONNOR, *supra*, at 11-22 (discussing Dallas and his contributions to reporting process); Francis R. Aumann, *American Law Reports: Yesterday and Today*, 4 OHIO ST. L.J. 331, 339-40 (1938) (advocating Dallas as earliest reporter). On the other hand, if the date of printed publication is not the test, why not consider cases recorded in lawyer's notebooks, like those of John Randolph, or Mr. Barradall and a Mr. Hopkins, which record decisions of the General Court of Virginia as early as 1730? *See* W. Hamilton Bryson, *Virginia Manuscript Law Reports*, 82 L. LIBR. J. 305, 305 (1990) (including Randolph, Barradall and Hopkins as authors of earliest law reports); Surrency, *supra*, at 50 (discussing early notebooks of Randolph, Barradell, and Hopkins). Why *Quincy's Reports*?

My answer is simple. Josiah Quincy Jr. was the first American to deliberately and self-consciously prepare a set of law reports. These were not just case notes for a law notebook. As will be seen, Quincy kept a separate law notebook, his Law Common-Place. Josiah Quincy Jr., Law Common-Place (1763), *microformed on* Massachusetts Historical Society vol. 56, reel 4 (Law Library Microfiche Consortium) [hereinafter Quincy, Law Common-Place]; *see also* Surrency, *supra*, at 50 (recalling how law students and legal practitioners named their law notebooks "common place" books). He titled the *Reports* manuscript, in his own bold hand, "Reports of Cases Solemnly adjudged in King's Bench Court of Assize and General Goal Delivery." Quincy Papers, at 5, *microformed on* Massachusetts Historical Society vol. 56, reel 4 (Law Library Microfiche Consortium). Further, the Massachusetts

This new edition, to be prepared under the auspices of the Colonial Society of Massachusetts, will provide more than just a re-edited text. Two other Quincy manuscripts, never published before, will be included. One is Quincy's personal legal notebook, that he called his Law Common-Place.[4] The other is a fascinating collection of political, literary and philosophical sayings, that Quincy called his Commonplace Book.[5] These will all be cross-indexed to the *Reports* themselves.

Together, these documents put *Quincy's Reports* into the context of Quincy's life. They permit us to understand more fully the intellectual life and jurisprudence of this brilliant young lawyer, recorded at the outset of the American Revolution, and more about the tumultuous times in which he lived and, all too soon, died.

It is certainly not my intention to repeat here the full textual and legal analysis that will accompany this new edition. Rather, I would like to step back for a moment to contemplate the overall significance of *Quincy's Reports*, both as an historic document and as a legal authority of continuing importance. For this is a document that touches on political and juristic controversies that still command our attention, still define our hopes and fears, and divide us. And, yes, I would like to talk a bit about the people behind these dry pages, the merchants and indentured servants, the bold sea captains and bankrupt speculators, the villains and cheats, the noble patriots and kindly philanthropists, the spies and swindlers, the whores and pimps, the exploited seamen and cruelly-used slaves who walked the streets just before the American Revolution. Let me begin with Josiah Quincy Jr., himself.

II. JOSIAH QUINCY JR. (1744-1775)

Josiah Quincy Jr. (Quincy) was born on February 23, 1744, the youngest son of a prosperous Boston merchant, also named Josiah.[6] Josiah Jr.'s

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courts have accepted *Quincy's Reports* as true, authoritative law reports and have cited them regularly. *See* Stamper v. Stanwood, 339 Mass. 549, 553, 159 N.E.2d 865, 868 (1959) (citing Notes on Banister v. Henderson, *in* QUINCY'S REPORTS, at 119 (1765)); *see also infra* note 34 and accompanying text (discussing cases in which Supreme Judicial Court of Massachusetts cites to Quincy's Reports).

4. Quincy, Law Common-Place, vol. 56, reel 4.

5. Quincy, Commonplace Book (1770-74) vol. 59, reel 4. The Commonplace Book has been carefully transcribed and edited by the leading authority on Quincy's life, Neil L. York. I am delighted to have his collaboration on this project. Jane G. Downing and Natalia Fekula, research assistants of most uncommon intelligence and dedication, are transcribing the Law Common-Place. *See generally* Quincy, Law Common-Place (1763) vol. 56, reel 4. My co-editor, Mark Walsh, continues to patiently compare the published *Quincy's Reports* against the manuscript at the Massachusetts Historical Society. Quincy Papers, vols. 54-55, 57-58, reel 4. Finally, thanks are due to Louis L. Tucker, Director, and Peter Drummey, Librarian, of the Massachusetts Historical Society, the most helpful custodians of the manuscript.

6. 15 DICTIONARY OF AMERICAN BIOGRAPHY 307 (Dumas Malone ed., 1946).

son would also be called Josiah and the three were thus nicknamed "Josiah the Colonel" (father), "Josiah the Patriot" (son), and "Josiah the President" or "Mayor" (grandson).[7] Quincy grew up in a world of opportunity and privilege. He entered Harvard College in 1759. He was fifteen. When he graduated with a bachelor's degree in 1763, at age eighteen, he was already hard at work on his legal studies and his *Reports*.[8] Known for his sensitivity, intelligence, and extraordinary gifts as an orator, Quincy seemed like a natural leader in a time of great challenge and opportunity. Indeed, his close friends and schoolmates became signers of the Declaration of Independence (Robert Treat Paine), justices of the new United States Supreme Court (William Cushing) and even President of the United States (John Adams).[9]

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7. *See* 1 The Massachusetts Bench and Bar: A Biographical Register of John Adams Contemporaries, *in* LEGAL PAPERS OF JOHN ADAMS at cvii (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereinafter Register of Bench and Bar] (describing nicknames of Quincy's family). Quincy's son became Mayor of Boston (1823-1829) and President of Harvard (1829-1845)—hence Quincy Market in Boston, Quincy Street and Quincy House in Cambridge. His son "Josiah the President" wrote the earliest secondary source for Quincy's life. JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOSIAH QUINCY JUN. OF MASSACHUSETTS (Boston, Cummings, Hilliard & Co. 1825). The biography is adulatory, but full of detail, particularly of Quincy's trip to England. *Id.* at 216-99; *see also* 15 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 6, at 309 (discussing Quincy's trip to England); 6 LAMB'S BIOGRAPHICAL DICTIONARY OF THE UNITED STATES, 385-86 (John Howard Brown ed., 1903) [hereinafter LAMB'S] (summarizing Quincy's trip to England); L. EDWARD PURCELL, WHO WAS WHO IN THE AMERICAN REVOLUTION, 395-96 (1993) (discussing Quincy). In his papers, John Adams also included a substantial amount of information about Quincy. 1 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 34-39, 51-53, 58-60, 63-75, 157-61, 263-64; 2 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 66 n.11, 335-50, 402-04, 409-10; 3 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 5-17, 20-22, 25-29, 35-42, 226-42. Other writers have included Quincy in their work on the American Revolution. *See* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 125, 134, 242-43, 250-55 (1972) (discussing Quincy's contributions); DENNIS A. O'TOOLE & LISA W. STRICK, "IN THE MINDS AND HEARTS OF THE PEOPLE" FIVE AMERICAN PATRIOTS AND THE ROAD TO REVOLUTION 59, 59-74 (1974) (providing overview of Quincy's life); PETER SHAW, AMERICAN PATRIOTS AND THE RITUALS OF REVOLUTION 22-25, 153-74, 223-24 (1981) (recounting Quincy's life); HILLER B. ZOBEL, THE BOSTON MASSACRE 219-24, 241-43, 259-60, 277-89 (1970) (discussing Quincy's work). Perhaps the best account is Professor York's hitherto unpublished introduction to his transcription of Quincy Commonplace Book, to be published as part of the *Quincy's Reports* project. Neil L. York, Maxims for a Patriot: Josiah Quincy Junior and His Commonplace Book (1993) (unpublished introduction, on file with author). I am very indebted to Professor York's account throughout.

Josiah Quincy Jr. was painted by Gilbert Stuart (1755-1828). Stuart painted Quincy in 1825 "'after studying family portraits and prints, and the result was considered a good likeness.'" *See* Descriptive List of Illustrations, *in* 3 LEGAL PAPERS OF JOHN ADAMS, *supra*, at viii (quoting 2 LAWRENCE PARK, GILBERT STUART 628 (1926)). The Quincy family still owns the portrait, which now is in the Boston Museum of Fine Arts. There is a reproduction in the LEGAL PAPERS OF JOHN ADAMS, *supra*, at illus. 9, facing p. 196. The portrait reveals that along with his struggle against tuberculosis, Quincy also had problems focusing one eye. It was yet another physical challenge overcome by the brilliant young lawyer.

8. *See* 15 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 6, at 307 (noting Quincy began his writings during his school years).

9. *See* Charles R.McKirdy, *Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession, in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, *supra* note 2, app. IV at

But Quincy was infected early in life with tuberculosis. Always sickly, he achieved everything he did in a few short years. On April 26, 1775, he died aboard a ship.[10] He was returning from a desperate secret mission to England, to try to encourage a peace—even as the shots rang out at Lexington and Concord. He died in Gloucester harbor, in sight of his beloved America. His young wife Abigail stood waiting on the docks with his new son, the future President of Harvard, in her arms. Quincy was just thirty-one.[11]

Quincy's life would have been remarkable had he left no writing. To start, he was a brilliant practicing lawyer. His law teacher was Oxenbridge Thacher, one of the colonies' leading jurists.[12] Quincy qualified for the bar by 1765, and soon had important clients of his own.

But Quincy was also a prolific writer. His writings reveal the tortured, stressful times in which he lived, because they were divided into his public "professional" work, such as the *Reports*, and his secret writings for the Committee on Public Safety. By day, the young Quincy dutifully attended the royal courts, carefully recording the arguments and holdings of the royal justices. At night, he attended the secret meetings of the patriot rebels. Under names like "Hyperion," "An Independent," "the Mentor," or simply "An Old Man," Quincy's articles appeared regularly in the *Massachusetts Gazette*.[13] They bitterly attacked the Tory establishment.[14]

III. QUINCY'S REPORTS (1761-1772)

Despite the courage of Quincy's patriotic writings, it is—perhaps ironically—his professional work which is, today, most important. Quincy was a blazing, brilliantly innovative young man, painfully aware of his fatal illness. In 1761, at only eighteen, he began a totally new departure in American legal writing. Massachusetts had established a university and a press

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339, 342-43, 348-50 (listing biographical sketches of Adams, Cushing, Paine, and Quincy).

10. 15 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 6, at 307.

11. *See id.* at 307 (listing Quincy's dates of birth and death).

12. McKirdy, *supra* note 2, app. IV at 350; *see also* 15 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 6, at 307 (discussing Quincy's legal training); RICHARD SCOTT ECKERT, "THE GENTLEMEN OF THE PROFESSION": THE EMERGENCE OF LAWYERS IN MASSACHUSETTS, 1630-1810, at 221-316 (1991) (providing overview of professional training and literature available during Quincy's time).

13. *See* 6 LAMB'S, *supra* note 7, at 386 (citing some of Quincy's articles); *see also* QUINCY, *supra* note 7, at 156-58 (giving text of letter that appeared in *Gazette*).

14. 15 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 6, at 307. Quincy's most important pamphlet "Observations on the act of Parliament, commonly called 'The Boston Port Bill,' with Thoughts on Civil Society and Standing Armies" was published in May, 1774. QUINCY, *supra* note 7, at 150. Quincy openly admitted authoring this work. This forthrightness led to a veiled and anonymous threat on his life and his property. *See id.* at 150-56 (reprinting ominous letter). The chilling threat and Quincy's brave reply in the *Massachusetts Gazette* are reproduced in his son's book *Memoir of the Life of Josiah Quincy Jun. of Massachusetts*. *Id.* at 150-58; *see also* 15 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 6, at 308 (citing periodical in which letter appeared).

by 1639, 122 years before, and had an independent legal system under both the First and Second Charters. But there were no "native" law reports before Quincy.

Of course, the Massachusetts press had long been used for legal publications, with law books exceeded in output only by books on theology.[15] These law books included jury oaths, abridgments, and a regular series of printed *Provincial Laws*, the statutory output of the colonies. According to Morris Cohen, fifty-five separate issues of the *Laws and Orders* of the General Court appeared between 1661 and 1691, 146 issues appeared from 1692 to 1742, and 208 issues of the *Acts and Laws* from November 1742 to 1775.[16] The *Lawes and Libertyes* of 1648 was the first codified system of law to appear in print in America, and one of the first such books to be compiled anywhere.[17] But, despite the regular sittings of the Superior Court of Judicature from at least the Second Charter (1692) on, there were no law reports. Instead, very expensive English reports were imported.[18] Why should this be? There was a clear judicial recognition, documented by Quincy himself, that the decisions of the Provincial courts were, and should be, sources of authority. These decisions also could be quite different from the royal common law of England.[19] The judges themselves were aware of this fact. Why, then, no reports?

In my Introduction to my new edition of *Quincy's Reports*, I will explore some possible answers to the mystery of why 130 years passed between 1639 and the first American law reports, the same time as between 1775 and our own century. One explanation is the small size of the bar—only about a dozen regular practitioners and only twenty-six barristers total on the rolls in 1762.[20] Colonial printers needed guaranteed mar-

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15. *See* Morris L. Cohen, *Legal Literature in Colonial Massachusetts*, *in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, *supra* note 2, at 243, 243-72 (recounting types and scope of publications available during colonial times); Erwin C. Surrency, *The Beginnings of American Legal Literature*, 31 AM. J. LEGAL HIST. 207, 207-08, 210-11 (1987) (providing overview of Massachusetts publications).

16. Cohen, *supra* note 15, at 253.

17. *See* Daniel R. Coquillette, *Radical Lawmakers in Colonial Massachusetts: The "Countenance of Authoritie" and the* Lawes and Libertyes, 67 NEW ENG. Q. 179, 194-201 (1994) (recounting evolution of *Lawes and Libertyes*).

18. Surrency, *supra* note 3, at 49.

19. Sometimes these differences were due to the existence of colonial legislation, and sometimes simply reflected the court's recognition of different customs in the colony, particularly as to the practice of merchants. *See* Notes on Bromfield v. Little, *in* QUINCY'S REPORTS, at 108, 108-09 (1764) (discussing differences between custom of merchants in Massachusetts and at "Home"); Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 80-86 (1763) (noting justices' disagreement over whether rule governing appeals controls).

20. *See* Memorandum, *in* QUINCY'S REPORTS, at 35, 35 (1762) (setting out roll of "Barristers at Law"). Of course, there were many "lawyers" who were not "barristers." *See* McKirdy, *supra* note 2, app. IV at 339-58 (profiling Massachusetts lawyers of 1775). Ironically, the roll of barristers never included Quincy himself. *See* QUINCY, *supra* note 7, at 27 (discussing how Supreme Court denied Quincy "the honours of the gown"). His son claimed that the reasons for Quincy's omission were

kets of a certain size or their business would not be successful.[21] But

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political. *Id.* "The political course of Mr. Quincy having rendered him obnoxious to the Supreme Court of the province, he was omitted in the distribution of the honours of the gown, which was due his rank and standing at the bar." *Id.* Nevertheless, Quincy appeared before the Superior Court of Judicature! This is his own account:

> At the laft Sitting of the Superiour Court in Charleftown, I argued (for the firft Time in this Court) to the Jury, though not admitted to the Gown:—The Legality and Propriety of which fome have pretended to doubt; but as no Scruples of that Kind difturbed me, I proceeded (maugre any) at this Court to manage all my own Bufinefs (for the firft Time in this County,) though unfanctified and uninfpired by the Pomp and Magic of—the Long Robe.

Memoranda, *in* QUINCY'S REPORTS, at 317, 317 (1769).

21. *See* Hugh Amory, *Under the Exchange: The Unprofitable Business of Michael Perry, a Seventeenth-Century Boston Bookseller*, 103 PROC. AM. ANTIQUARIAN SOC'Y 31, 31-50 (1993) (discussing plight of colonial bookseller). Erwin Surrency points out that the public underwrote the statute books; whereas law reports did not receive the same funding until more than a century later. Surrency, *supra* note 3, at 49. He adds that the very small number of lawyers and the availability of manuscript notebooks, like Quincy's Law Common-Place, left little demand for printed copies. *Id.* at 49-50, 54. In addition to the economics of the printing business, Surrency mentions two other factors that might have discouraged American law reports. *See id.* at 51-52 (commenting on reasons for reports). One was the lack of written opinions, and the belief of some early lawyers that the decisions of colonial courts did not warrant publication. *Id.* at 51. A second reason, not unrelated to the first, was the higher prestige of the English reports, which provided imported competition. *Id.* at 49, 54. In Jefferson's words, colonial judges were chosen:

> without any regard to legal knowledge, their decisions could never be quoted, either as adding to, or detracting from, the weight of those of the English courts, on the same points. Whereas, on our peculiar laws, their judgments, whether formed on correct principles of law, or not, were of conclusive authority.

THOMAS JEFFERSON, *Preface* to REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA 5 (Michie 1903) (1829); *see also* Surrency, *supra* note 3, at 51-52 (discussing Jefferson preface).

The judges of Quincy's Massachusetts Superior Court of Judicature, with a few exceptions like Edmund Trowbridge, Benjamin Lynde, and William Cushing, were not trained professionals. *See* McKirdy, *supra* note 2, app. IV at 330, 332 (listing judges who were also lawyers); Surrency, *supra* note 15, at 214. (suggesting colonial judges lacked legal training). Rather many of the judges were wealthy merchants and "gentlemen." *See* McKirdy, *supra* note 2, app. IV at 330, 332 (listing judges' occupations). But the exchanges and questions of the judges recorded in *Quincy's Reports* leave a clear impression of professional competence. On occasion, Quincy questioned individual arguments. *See infra* note 28 (characterizing Quincy as critical of counsel's arguments). Nevertheless, he recorded the judicial holdings with care and respect. Further, as will be discussed in Part IV *infra*, the decisions of the judges were represented as clearly authoritative in Massachusetts, even when inconsistent with English cases—at least as a practical matter. Surrency, supra note 3, at 52; *see also infra* notes 104-04 and accompanying text (summarizing that colonial judges did not strictly adhere to English precedent). Finally, in several instances, Quincy managed to obtain possession of manuscript opinions, such as the one by Judge Trowbridge in *Hooton v. Grout*, although this practice was clearly no more common in the Massachusetts of Quincy's day than it was in England. Notes on Hooton v. Grout, *in* QUINCY'S REPORTS, at 343, 343-69 (1772). In both locations, oral opinions from the bench were the practice. *See* Surrency, *supra* note 3, at 55 (commenting that statutes modified oral practice by requiring written judicial opinions). Only in 1785 did Connecticut first require written opinions by statute. *See id.* (noting Connecticut's statute viewed law as form of science thereby requiring written opinions).

Perhaps Quincy's pride in the growing professionalism of the Massachusetts bar and bench and a growing sense of independence from English authority led him to begin his *Reports*. *See id.* at 54 (asserting that once America became independent lawyers labored to create American jurisprudence). This would be consistent with Surrency's arguments for why such reports had not occurred before, and with some of Quincy's later assertions of professionalism. *See* discussion *infra* Part IV.D; *infra* note

Josiah Quincy clearly envisioned a new era, and his *Reports*, covering the years 1761-1772, were clearly and self-consciously designed to be the beginning of something new.

This departure, in itself, would have been extraordinary. But *Quincy's Reports* were no ordinary law reports, and these were no ordinary times. Like many of the English reports with which Quincy was familiar,[22] his own reports covered more than just judicial decisions. Like the *Year Books*, *Quincy's Reports* included arguments of counsel, and almost anything else that Quincy found of interest in the courtroom, including *ad hominem* insults and dress.[23] When Chief Justice Hutchinson's house was burned by the Boston mob, Quincy poignantly portrayed the old man in his borrowed clothes, appearing the next day to preside over the court, despite having lost everything he owned.[24] If counsel were asked to submit written briefs, which happened occasionally, Quincy would include the briefs in the *Reports*. In the unusual case where there was a written judicial opinion, he would include that, too. Perhaps surprisingly, given the closed society of just a dozen lawyers and five judges, there were frequent dissents, over thirty-one, and there were often closely split votes among the judges. Quincy dutifully recorded these disputes, and the oral debate among the judges.[25]

Thus, *Quincy's Reports* give a graphic and detailed view of the proceedings of the Superior Court of Judicature from 1762-1772. As a "colonial" version of an English high court, like the King's Bench, the superior court had a trial jurisdiction for serious crime, a trial de novo jurisdiction, and a review jurisdiction, both in error and in a "reservation of judg-

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130 (discussing growing need for and value of colonial reports).

22. *See* Quincy, Law Common-Place, *supra* note 3 (evincing knowledge of English law). His Law Common-Place is filled with references to English reports including *Coke's Reports* (1598-1615), *Salkeld's Reports* (1689-1712), *Modern Reports* (1669-1732), *Croke's Reports* (1582-1641), *Strange's Reports* (1716-1749), and many more.

23. *See generally* Notes on Banister v. Henderson, *in* QUINCY'S REPORTS, at 119, 119-48 (1765) (recording barbed exchange between lawyers). The old English *Year Books*, which contained similar information, were kept by law students for study purposes. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 50-65 (1968) (describing reasons for the contents and the evolution of the Year books).

24. *See* Destruction of the House of the Chief Justice, *in* QUINCY'S REPORTS, at 168, 170-71 (1765) (highlighting description of Chief Justice after Boston mob burned his house).

25. *See* Notes on Noble v. Smith, *in* QUINCY'S REPORTS, at 254, 254 (1767) (demonstrating lack of agreement among justices); Notes on Apthorp v. Eyres, *in* QUINCY'S REPORTS, at 229, 230-31 (1766) (depicting justices' dispute over admissibility of evidence); Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 191 (1765) (recording disagreement among justices as to whether justices or jury should decide case at bar); Notes on Banister v. Henderson, *in* QUINCY'S REPORTS, at 119, 122-23 (1765) (describing dispute over how to prove valid marriage); Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 77-78 (1763) (transcribing justices' dispute over admiralty law); Notes on Baker v. Mattocks, *in* QUINCY'S REPORTS, at 69, 72-74 (1763) (depicting justices' lack of consensus on freehold estate issue); Notes on Russel v. Oakes, *in* QUINCY'S REPORTS, at 48, 49-50 (1763) (recording justices' dispute over negotiability of instrument).

ment."[26] It heard cases from both the Inferior Court of Common Pleas (Civil) and the General Sessions of the Peace (Criminal). Quincy could, and did, observe all aspects of the colonial justice system.[27] In addition, his personal intelligence resulted in insights into the cases that often escaped all the active participants. In 1762, Quincy was still a college boy of eighteen, but he already had an astonishing knowledge of the English treatises and leading cases. His marginal notes, politely correcting errors by the lawyers *and* the judges, are frequently brilliant, and very rarely wrong.[28] Quincy also had his two personal notebooks, his Law Common-Place and his collection of political and philosophical "maxims," the Commonplace Book. Taken all together, these documents provide a remarkably complete look at the private legal reasoning and public persona of an eighteenth-century lawyer—quite important in itself, even if Quincy had not also been genuinely brilliant and a great patriotic leader.

Quincy's early death and the immediate outbreak of serious fighting in the colonies put his vision of an American law report "on hold." Although the Superior Court of Judicature technically survived the Revolution intact—Justice William Cushing never resigned—three of the five justices fled the country. More poignantly, six of the fourteen most active members of the bar also fled—including Josiah's only, dearly beloved, brother,

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26. *See* Barbara Aronstein Black, *The Concept of a Supreme Court: Massachusetts Bay 1630-1686*, *in* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, at 43, 43-79 (Russell K. Osgood ed., 1992) (discussing origins of Supreme Judicial Court of Massachusetts). Quincy himself called his reports, "Reports of Cases Solemnly Adjudged in King's Bench Court of Assize and Goal Delivery". *See* Quincy Papers, *supra* note 3 (noting handwritten title); *see also* Catherine S. Menand, *A "magistracy fit and necessary": A Guide to the Massachusetts Court System*, *in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, *supra* note 2, at 541, 541-49 (describing creation of colonial court system and its hierarchical structure); Russell K. Osgood, *The Supreme Judicial Court, 1692-1992: An Overview*, *in* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, *supra*, at 9, 9-16 (depicting establishment of Superior Court of Judicature).

27. Black, *supra* note 26, at 43-79.

28. The most poignant example of Quincy's critical commentary is the annotation to the infamous *Allison v. Cockran* case. Notes on Allison v. Cockran, *in* QUINCY'S REPORTS, at 94, 94 (1764). The case was about whether administrators were competent witnesses in matters "affecting the Eftate of their Inteftate," but the cause of action was "Trover for a Negro." *Id.* Quincy observed: "*Qu.* if this Action is well brought, for Trover lies not for a Negro. 2 Salk. 666. Ld. Raym. 1274, 146. Cafes in the Time of Holt, 495." *Id.* at 94 n.*. Lord Holt had held that "[T]he common law takes no notice of negroes being different from other men. . . . [T]here is no such thing as a slave by the law of England." Smith v. Gould, 2 Ld. Raym. 1274, 1275, 92 Eng. Rep. 338, 338 (K.B. 1706); *see also* Notes on Allison v. Cockran, *in* QUINCY'S REPORTS, at 94, 96 n.1 (1764) (quoting and citing *Smith v. Gould*). Of course, this may have been a "correct" observation of the common law, but it was, shamefully, not the colonial law of Quincy's Massachusetts. *See* Notes on Richmond v. Davis, *in* QUINCY'S REPORTS, at 279, 298 (1768) (questioning presciently whether uninterrupted practice may change rule of law); *infra* Section IV.C (discussing colonial law). Quincy also made many technical, and largely correct, criticisms of counsel's arguments. *See generally* Notes on Banister v. Henderson, *in* QUINCY'S REPORTS, at 119, 126 n.* (questioning counsel's arguments).

Samuel Quincy.[29]

By the time the fighting was over, other lawyers had begun to share in Quincy's vision, such as A.J. Dallas in Pennsylvania (whose reports included the first Supreme Court Reports) (1790-1807), Francis Hopkinson in the Philadelphia Admiralty Court (1789), Ephraim Kirby in Connecticut (1789), George Wythe in Virginia (1788) and, last but not least, Thomas Jefferson himself, whose *Reports of Cases Determined in the General Court of Virginia* were published in 1829.[30] In Massachusetts itself nothing was done until 1803, when an "Act providing for the appointment of a Reporter of Decisions in the Supreme Judicial Court" was passed.[31] Pursuant to this statute, Ephraim Williams was appointed Reporter and issued the first "official" Massachusetts reports, *Williams Reports* (1804-1805), forty years after Josiah Quincy's first efforts.[32]

As to *Quincy's Reports* themselves, they languished in manuscript until 1865, when Quincy's great-grandson retrieved the original manuscripts and edited them for publication. They then appeared in print in an edition by Little, Brown and Company, the first, and last edition, until this new effort.[33] Remarkably, *Quincy's Reports* have been regularly cited by the Supreme Judicial Court from 1864 to 1959.[34]

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29. *See* McKirdy, *supra* note 2, app. IV at 339-58 (listing biographies of Quincy's colleagues); Register of Bench and Bar, *supra* note 7, at xcv-cxiv (summarizing fates of Quincy's contemporaries).

30. *See* Surrency, *supra* note 3, at 50-53 (providing historical overview of colonial notebooks); *see also* Aumann, *supra* note 3, at 337-43 (discussing colonial reporters).

31. 1803 Mass. Acts 133.

32. *See* Ephraim Williams, *Preface to the First Edition* of REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS at iii-iv (3d ed., Boston, Little, Brown & Co. 1883) (1805); Surrency, *supra* note 3, at 56 (discussing Massachusetts' novel move in appointing court reporter to record Supreme Judicial Court decisions).

33. Because it is no longer subject to copyright, the 1865 edition has been copied and distributed by publishers who have simply reproduced the exact pages. QUINCY'S REPORTS (Dennis & Co. 1948) (1865); QUINCY'S REPORTS (Russell & Russell 1969) (1865).

34. Stamper v. Stanwood, 339 Mass. 549, 553, 159 N.E.2d 865, 868 (1959); Ratner v. Hill, 270 Mass. 249, 254, 170 N.E. 69, 71 (1930); *In re* Sheehan, 254 Mass. 342, 347, 150 N.E. 231, 234 (1926); Commonwealth v. Kozlowsky, 238 Mass. 379, 386, 131 N.E. 207, 210 (1921); Merrick v. Betts, 214 Mass. 223, 226, 101 N.E. 131, 132 (1913); Nolin v. Pearson, 191 Mass. 283, 284, 77 N.E. 890, 890 (1906); Hunting v. Safford, 183 Mass. 157, 160, 66 N.E. 642, 643 (1903); Derick v. Taylor, 171 Mass. 444, 446, 50 N.E. 1038, 1039 (1898); Pratt v. Bates, 161 Mass. 315, 318, 37 N.E. 439, 440 (1894); O'Loughlin v. Bird, 128 Mass. 600, 601 (1880); Dorr v. Tremont Nat'l Bank, 128 Mass. 349, 359 (1880); Evans v. Clapp, 123 Mass. 165, 170 (1877); *In re* Cartwright, 114 Mass. 230, 238 (1873); Turner v. Langdon, 112 Mass. 265, 266 (1873); Farmington River Water Power Co. v. County Comm'rs, 112 Mass. 206, 214 (1873); Oliver v. Colonial Gold Co., 93 Mass. (11 Allen) 283, 286 (1865); Holbrook v. Bliss, 91 Mass. (9 Allen) 69, 72 (1864); Searle v. Abbe, 79 Mass. (13 Gray) 409, 412 (1859).

IV. THE "POMPEII OF PAPER"—OR WILLIAMSBURG THIS WAS NOT: A FUNCTION OF LEGAL HISTORY

Visitors to "colonial" Williamsburg are asked to "step back" into the elegant world of colonial life as it was in the Virginian capital in 1765, just before the Revolution. "Servants" in costumes open the doors, and great attention is paid to details like parcel wrapping and wallpaper. The effect is delightful and escapist. A bowl of mulled colonial ale is accurately served in a tankard. All seems right with the world. As a participant in one recent legal conference in Williamsburg observed, "Here we are in a fake eighteenth-century city to worry about a real eighteenth-century legal system!"[35]

The real 1765 was very different, and the Massachusetts Court records, including *Quincy's Reports*, are hard evidence of what life was actually like before the Revolution. These records can truly be described as a "Pompeii of Paper."[36] They capture colonial life in exquisite and candid detail, like bugs in amber. Here are the great and petty affairs of the time, "warts and all." Here is the best and the worst of society. Prostitution and exploitation of women coexists with noble sentiments of courtesy and fairness. Exhortation of human dignity is found on pages next to the blatant trade in human beings. All in all, it is a bad time. Families are split by political tension, the mob runs free, and young men fear what the future may bring.[37]

I can only begin to demonstrate, in this short lecture, the wealth of information in these *Reports*, and its importance. Let me give but a few examples, moving progressively—at least in my opinion—from the narrowest categories, cases relevant as authority for constitutional construction, to the most fundamental, cases that give insights into the nature of the rule of law.

A. Constitutional Construction: An Example of Jury Trial

Certainly one function of *Quincy's Reports* is its value in resolving continuing constitutional controversies. Recently, I filed an amicus brief with other legal history scholars in the Supreme Court of the United States. This brief was also signed by Akhil Reed Amar, Arthur R. Miller,

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35. Participant, Meeting of the Committee on Court Administration and Case Management, Judicial Conference of the United States, (Dec. 4, 1995).

36. *See* Robert J. Brink, *"Immortality brought to Light": An Overview of Massachusetts Colonial Court Records*, *in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, *supra* note 2, at 471, 471-97 (discussing how colonial records reveal intrinsic historical details and personal sentiments of colonial life).

37. *See* QUINCY, *supra* note 7, 160-62 (recording heartbreaking letter to patriot Josiah Quincy Jr. from his dearly beloved loyalist brother Samuel); *see also id.* at 31-32 (articulating tension in colonial life).

Arthur F. McEvoy, and Erwin Chermerinsky, among others. The case, *Gasperini v. Center for Humanities, Inc.*,[38] was a request for certiorari to review a Second Circuit decision which substituted a de novo "weight-of-the-evidence" review for a large jury verdict, applying a New York statute.[39] The issue was whether the decision violated the Reexamination Clause of the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[40] The "rules of the common law" must, as a matter of historical context, be determined as of the date of the Seventh Amendment, i.e., 1791.[41]

But there are many difficulties in determining the rules of common law as of 1791. With few relevant cases in England, and, of course, almost none reported here, it has been an area of great speculation. With new efforts to limit large civil damages, this historical game is now being played intensely.

One of the few reliable sources is *Quincy's Reports*. In three cases, the justices carefully deliberated the power of an appellate court to review a jury verdict, or to substitute its judgment for a jury verdict. In *Angier v. Jackson*,[42] a motion was made for a new trial because "the Jury gave a Verdict for Damages in Favour of Jackfon, original Plaintiff, contrary to the Mind of the Court."[43] Trowbridge, counsel for the appellant, argued that "[w]hen the Jury give a Verdict againft Evidence, the Court may grant a new Trial. That Jury are not abfolute Judges of Evidence and Damages, fee Holt's Rep. 701, 702, *Afh vs. Lady Afh.* Jurys are to try Caufes with

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38. 116 S. Ct. 2211 (1996).

39. *See id.* at 2216-17 (providing procedural history of case). The Court applied section 5501(c) of the New York Civil Practice, Law and Rules. *Id.* at 2215, 2218; *see also* N.Y. C.P.L.R. 5501(c) (McKinney 1995) (defining appellate court scope of review).

40. U.S. CONST. amend VII; *see also Gasperini*, 116 S. Ct. at 2221-22 (discussing Seventh Amendment).

41. *See* David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 448-55 (1971), *cited with approval in* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333 (1979) (arguing 1791 as appropriate date for commencement of common law under Seventh Amendment). This Donahue Lecture was delivered before the majority opinion in *Gasperini*, 116 S. Ct. 2211, came down on June 24, 1996. The majority opinion, by Justice Ginsburg, observes in a footnote that "If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, 'twelve good men and true.'" *Id.* at 2224 n.20 This view was attacked by Justice Scalia, in dissent, joined by the Chief Justice and Justice Thomas. Justice Scalia called the "12 juror" analogy "desperate," noting that there is "of course no comparison between the specificity of the command of the Reexamination Clause and the specificity of the command that there be a 'jury.'" *Id.* at 2236 (Scalia, J., dissenting). He strongly criticized the "footnote abandonment of our traditional view of the Reexamination Clause," and observed that "the court frankly abandons any pretense at faithfulness to the common law, suggesting that 'the meaning' of the Reexamination Clause was not 'fixed at 1791,' contrary to the view of all our prior discussions . . . ." *Id.* (citation omitted).

42. Notes on Angier v. Jackson, *in* QUINCY'S REPORTS, at 84 (1763).

43. *Id.* at 84.

the Affiftance of Judges."[44] The Court disagreed, holding that there can be no new trial even when it is "not clear" whether there is evidence to support a jury verdict.[45] The Chief Justice, apparently in dissent, stated that "were it evidently againft Law and Evidence, there the Court may grant a new Trial, but not where there is Evidence on both Sides."[46]

The issue was discussed again in *Norwood v. Fairservice*.[47] This was an action on an indenture, with a defense based on the defendant's section of the indenture.[48] This section of the indenture clearly had different terms from that in possession of the plaintiff. Samuel Fitch, attorney for the plaintiff, "fuggefted a Fraud in the Defendant," and that the Court, not the jury, should view the document.[49] Robert Auchmuty, for the defense, argued that this is a "plain Matter of Fact, of which the Jury are the fole Judges."[50] He continued, "Neither do I think the Court have any Right to

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44. *Id.* Auchmuty, arguing to defend the verdict from a new trial, stated, "If ever any Cafe was excepted from new Trials, this is. . . . I confefs I wifh for a Power in the Court to fet afide Verdicts, but not for an unlimited one. This Cafe was not againft Evidence. . . . The Court is not to be Judge of the Law and Fact too abfolutely; if it fhould be, it takes away all Verdicts but fuch as are agreeable to the Mind of the Court." *Id.* at 84-85. Trowbridge, arguing for a new trial, replied, "It can never be fuppofed that a Verdict will be given againft direct Evidence, without Shadow of Evidence to fupport it. . . . I hold, this Court always have Right to grant new Trials when they think Injuftice like to be done." *Id.* at 85. Trowbridge lost. *Id.*

45. *Id.* at 85.

46. *Id.* Quincy records that "*Juftices Oliver, Cufhing, Ruffell & Lynde* [were] againft a new Trial, becaufe the Court were not clear in the former Trial." *Id.* There is no record of Chief Justice Thomas Hutchinson joining the opinions, and the listing of the judges implies a divided court. *Id.* The editor of the 1865 printed version, Samuel M. Quincy, observed that the Massachusetts law had now changed, citing Chief Justice Shaw in *Miller v. Baker*, 37 Mass. (20 Pick.) 285, 289 (1838):

> For a long time it was confidered that a new trial could only regularly be granted, where the verdict was without evidence or againft the whole evidence. It has however been extended to cafes, where the verdict is clearly againft the weight of evidence, although evidence was given on both fides.

Notes on Angier v. Jackson, *in* QUINCY'S REPORTS, at 84, 85 n.4 (quoting Chief Justice Shaw).

47. Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189 (1765).

48. *Id.* at 189. *Jowitt's Dictionary of English Law* defines an "indenture" as "a deed made between two or more parties" written two times "on one piece of parchment or paper, and then . . . cut . . . in two in an indented or toothed line, so that each copy of the deed fitted the other and could thus be identified." JOWITT'S DICTIONARY OF ENGLISH LAW 960 (John Burke ed., 2d ed. 1977). Obviously, the two copies ought to match, exactly. In *Norwood*, they did not. One half of the document gave a sum as covenanted for one year, and the other, the same sum covenanted for a quarter of the year. Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 189 (1765).

49. Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 189 (1765). Quincy then reported:

> 'Twas then further urged by the Plaintiff's Council [sic], that this Practice was well founded, and the Reafon of it was this, that Nothing fhould go to a Jury which would only tend to deceive and inveigle them; and that therefore when a Piece of Evidence was offered, on the Face of which Fraud appeared, the Court rejected the Evidence, as 'twould only tend to miflead.

Id. at 190.

50. *Id.* at 189. Once again, Auchmuty defended the power of the jury, as he did in *Angier v. Jackson*. *See* Notes on Angier v. Jackson, *in* QUINCY'S REPORTS, at 84, 84-85 (1763) (arguing that if

determine this Matter; for 'twill be abridging the Priviledges of the Subject, to settle a Point which wholly lies with the Jury to determine."[51] On another split vote, the justices held that they should not view the indenture itself, but it should go to the jury—both parts.[52] Justice Cushing observed, "The Jury is fole Judge of this; they muft give what Credit they pleafe."[53]

The issue was raised again in *Carpenter v. Fairservice*.[54] Here the issue was whether the words "in one Month," which were deleted in a Note of Hand "payable Upon Demand," had been erased before, or after, the signing of the note.[55] Chief Justice Hutchinson observed, "[F]urely the Court could not determine the Weight of the Evidence of the Witnefs; but that the Jury are the fole Judges of the Credibility of this Witnefs, upon whofe Teftimony alone if refts, whether this Razure was before or after figning."[56] But here, Justices Oliver and Lynde disagreed, arguing "that, as the Note did not fupport the [plaintiff's] Declaration, it fhould not go in as Evidence."[57] Chief Justice Hutchinson and Justice Cushing argued that

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courts decide verdicts only causes favorable to justices will prevail); *see also* Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 189-90 (1765) (arguing for Jury, not Court, as decisionmaker).

51. Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 190 (1765).

52. *Id.* at 191. Justice Cushing agreed with Justice Oliver's statement that the matter "properly belongs to the Jury." *Id.* Justice Lynde objected that "[a]s the Practice of this Court has always been otherwife, I am for viewing it." *Id.* Chief Justice Hutchinson observed that "I know the Cuftom has been otherwife, but, for my Part, I think 'tis Time it was altered—am for admitting it [to the Jury]." *Id.* Justice Russell, as was sometimes the case, was not sitting. *See* Address of the Chief Justice, *in* QUINCY'S REPORTS, at 171, 171 (1765) (listing justices present and absence of Justice Russell). He resigned a year later, in 1766. *See* McKirdy, *supra* note 2, app. IV at 329-32 (listing terms of colonial Superior Court Judges in Massachusetts). Of course, the Chief Justice's willingness to change prior custom shows a need for law reports! Quincy recounts the Chief Justice's admission in Court that he had been "filent" in other cases, although "he had always doubted" [the practice of keeping the evidence from this jury]. Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 190 (1765).

> In Anfwer to which, it was urged by *Meffrs. Gridley & Fitch*, that it had always been the Cuftom of this Court to determine in fuch Cafes. To which the Court agreed; and *Juftice Lynde* said that he knew a fimilar Cafe of one *Lanfon's*, in Middlefex: But the Chief Juftice anfwered, that he had always doubted in thofe Cafes, but whenever they arofe, the Court always affirmed the conftant Practice, and fo he was filent.

Id.

53. Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 191 (1765).

54. Notes on Carpenter v. Fairservice, *in* QUINCY'S REPORTS, at 239 (1767).

55. *Id.* at 239. This time Auchmuty was arguing *against* the jury power, objecting "that the Note thus erafed did not fupport the Declaration; therefore not Evidence to fupport it." *Id.* Samuel Quincy, Josiah's brother, "reply'd, that the Jury were Judges of this Matter, and would determine whether the Razure was before, or after figning." *Id.*

56. *Id.* at 240.

57. *Id.* at 239. Justice Oliver clearly changed his position from that in *Norwood*. *See* Notes on Norwood v. Fairservice, *in* QUINCY'S REPORTS, at 189, 191 (1765) (arguing evidence properly belonged with jury). Lynde remained consistent. *Compare id.* (asserting Court should decide case), *with* Notes on Carpenter v. Fairservice, *in* QUINCY'S REPORTS, at 239, 239 (1767) (advocating that Court decides issue).

the whole matter should go to the jury.[58] Justice Trowbridge not sitting, the court was evenly divided, and the plaintiff lost his declaration.[59] Quincy dropped one of his insightful notes here, referring the reader to the contrary holding in *Norwood v. Fairservice*, just discussed.[60] He was right, of course. "The queftion as to the time when an alteration of a written inftrument was made, is for the jury," his grandson, Samuel M. Quincy, aptly observed.[61] Perhaps this case was one of those that convinced Quincy that a regular set of Massachusetts reports was needed! In all events, I hope *Quincy's Reports* will be important reading for the Supreme Court of the United States in 1996 in resolving *Gasperini v. Center for the Humanities, Inc.*[62]

B. Colonial Jurisprudence: Herein of Scollay Square and Bromfield Street

Another use of *Quincy's Reports* is to test current academic theories about pre-Revolutionary American jurisprudence. Where did the colonists look for their law? How bound were they by English legal doctrines? Did they consciously make new law to solve the peculiar social and economic problems of a new land?

One instructive case is *Dunn v. Scollay*.[63] The Scollays were wealthy Boston merchants. John Scollay owned the Brigantine *Peggy*, which engaged in the lucrative slave trade on the Guinea Coast, while consigned to William Sitwell of London.[64] Returning in the fall of 1756, the *Peggy*

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58. Notes on Carpenter v. Fairservice, *in* QUINCY'S REPORTS, at 239, 239 (1767).

59. *Id.* at 240.

60. *Id.* at 240 n.*.

61. *Id.* at 240 n.1.

62. On June 24, 1996, three months after this Donahue Lecture, the Supreme Court decided *Gasperini*. 116 S. Ct. 2211 (1996). The majority duly rejected the noble historical arguments of our amicus brief, and ignored *Quincy's Reports*. *See id* at 2222-24 (finding nothing in Seventh Amendment which precludes appellate review of trial judge's decision to set aside jury verdicts); *supra* text accompanying note 38 (discussing issues raised *Gasperini*). The primary rationale of the Court was noted by Justice Stevens in a dissent which also rejected our historical arguments. "[T]he Framers of the Seventh Amendment evinced no interest in subscribing to every procedural nicety of the notoriously complicated English system . . . ." 116 S. Ct. at 2229 (Stevens, J., dissenting).

Our position was adopted by Justice Scalia, in an eloquent and learned dissent joined by the Chief Justice and Justice Thomas. *Id.* at 2231-36 (Scalia, J., dissenting). Justice Scalia observed, "[t]he weight of the historical record strongly supports the view of the common law taken in our early cases." *Id.* at 2233. He continues, "[t]he Court, as is its wont of late, all but ignores the relevant history." *Id.* at 2234. He concludes, "[a]las, those who drew the [Seventh] Amendment, and the citizens who approved it, did not envision an age in which the Constitution means whatever this Court thinks it ought to mean—or indeed, whatever the courts of appeals have recently thought it ought to mean." *Id.* at 2240. *Quincy Reports* strongly supports Justice Scalia, at least as to the historical record.

63. Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187 (1765); Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74 (1763).

64. Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187, 187 n.1 (1765).

was taken at sea on October 26, 1756 by a French privateer, aptly named the *Entreprenante*.[65] The Captain of the *Peggy*, Isaac Freeman, was a clever and persuasive man, and convinced the French to accept a ransom bill on Sitwell and return the ship, the ransom note clearly being more than the pirates could get in France for their prize, but less than the value of the voyage.[66] Not being fools, the French took the first mate, one Dunn, as a hostage for payment.[67]

Once the ship was returned, however, neither Scollay nor Sitwell paid the bill.[68] Dunn languished in prison at Nantes where "he remained in a fick and deftitute condition."[69] (Sitwell, apparently, sent Dunn one shilling a day for his support in prison.)[70] Neither Scollay nor Sitwell, of course, were privy to Freeman's ransom contract, as a matter of strict contract law. Six years later, Dunn's friends and family finally raised money for his ransom. On his return to Boston, Dunn promptly sued Scollay.[71]

It might, at first appearance, seem obvious that both the strict letter of contract law and the economic interests of the Boston mercantile establishment would make this an easy case. Scollay's act may have been blatantly immoral, but there was no legal basis to bind him to a contract he had never seen nor approved. Yet for many years the customary law of the sea, as applied in the Admiralty Courts, had held that the master of a vessel could bind the vessel itself, without the knowledge of the owner, where the question was urgent repair to a vessel.[72] The reason was obvious: a valuable voyage might otherwise be cut short, and the profits lost. This doctrine, called "bottomry" or "hypothecation," was well-known to Quincy and the Boston lawyers.[73] Was not *Dunn*'s case the same?

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65. *Id.*

66. *Id.*

67. *Id.* Ransom notes were not uncommon in the latter half of the eighteenth century. *See* Christopher P. Rodgers, *Ransom Bills and Commercial Credit in English Law—an Early Excursus in Comparative Legal Science, in* THE GROWTH OF THE BANK AS INSTITUTION AND THE DEVELOPMENT OF MONEY-BUSINESS LAW 345, 349-51 (Vito Piergiovanni ed., 1993) (discussing ransom bills and English law).

68. Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187, 187 n.1 (1765). Sitwell claimed that the underwriters should pay, "but, as they refufed, he wrote to Dunn, that there was 'no Way to compell them without Law, and that would be attended with great Uncertainty, as this, they fay, in a Cafe has not been try'd'—and alfo that he was inftructed by Scollay to fettle without regard to the ranfom bill." *Id.* Sitwell was right that the matter was unsettled in English law. *See infra* note 95 (discussing issue of hostages under English law).

69. Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187, 187 n.1 (1765).

70. *Id.* at 188 n.1.

71. Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 75 (1763).

72. *See* F.L. WISWALL JR., THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, at 9-10 (1970) (defining "hypothecation" as pledging of vessel).

73. *See* Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 77-78 (1763) (describing counsel's argument on hypothecation and its applicability to hostages); *see also* Coquillette, *supra* note

The willingness of early American courts to depart from black letter common law, particularly English law, and apply new doctrines based on the necessities of colonial trade or social policy has been a subject of hot debate among legal historians. John Murrin has argued that Massachusetts was experiencing "rapid and pervasive Anglicization" of its legal system, a process only cut off by the Revolution.[74] Morton Horwitz takes a different view. In his prize-winning and original book, *The Transformation of American Law, 1780-1860*,[75] he describes a period of stability right up to and through the Revolution.[76] There was, to be sure, an "'inevitable and rapid reception of the body of English common law,'" but only on the terms of the Americans and almost solely by local statute, not judicial activism.[77] According to Horwitz, real legal change occurred only after the Revolution, with the breakdown of the eighteenth-century "conception of law" and the emergence of an "instrumental perspective on law."[78] Only then did the courts narrow the province of the jury and undertake "an innovative and transforming role."[79] William E. Nelson takes yet a third view. A pioneer in the use of unpublished court records—as opposed to exclusive reliance on statutes and reported decisions and treatises—Nelson has concentrated on Massachusetts. His central thesis emphasizes the roles of judges and juries in the trial of cases.[80] Nelson argues, in contrast to Murrin, that the pre-Revolutionary period saw the increasing power of juries, both in fact-finding and law-finding, the de-emphasis of special pleading, a limited role for judges, and a strong sense of local indigenous justice.[81]

2, at 382-95 (noting John Adams' vice admiralty expertise). There are also a few good sources on colonial vice admiralty jurisdiction. *See generally* DAVID R. OWEN & MICHAEL C. TOLLEY, COURTS OF ADMIRALTY IN COLONIAL AMERICA (1995) (studying colonial courts of admiralty); CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960) (discussing colonial vice admiralty courts); L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250 (1962) (outlining colonial vice admiralty system).

74. *See* John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, *in* COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 540, 546-61 (Stanley N. Katz & John M. Murrin eds., 3d ed. 1983) (describing changes in provincial Massachusetts).

75. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

76. *Id.* at 1-6.

77. *Id.* at 5.

78. *Id.* at 4.

79. *Id.* at 1.

80. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at ix-xvii (Univ. of Ga. Press 1994) (1975) (outlining hypothesis).

81. *See id.* at 165-74 (focusing on new roles for judge and jury); *see also* Daniel R. Coquillette, *Introduction: The "Countenance of Authoritie"*, *in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, *supra* note 2, at liii-lvi (discussing effects of American Revolution on colonial legal system); William E. Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case*

Cases like *Dunn v. Scollay*[82] are direct tests of these academic theories. The case was originally brought by Dunn's lawyers, Auchmuty and Gridley, in the Vice Admiralty Court, where they clearly hoped to use an extension of the Admiralty's "hypothecation" doctrine to bind Scollay to an agreement he never joined. Their argument was that the case involved a prize "taken upon the High Seas," and was thus within the traditional admiralty jurisdiction.[83] Scollay's lawyers sought a "prohibition," an order "to restrain an inferior court with the limits of its jurisdiction," to stop the admiralty proceeding.[84] They argued that the relationship between Dunn and Scollay was just an issue of personal liability in contract, a simple common-law matter.[85] The vessel was not involved.[86]

Auchmuty, for Dunn, appealed to both the fairness and the economic necessity of permitting masters to bind owners to contracts that save the voyage, "otherwife the Whole would be loft."[87]

> Mafters may make Contracts that bind the Owners. Molloy, B. 2, C. 1, § 10; Ch. 2, §§ 14 & 16. Ib. B. 2, Ch. 2, § 2. Hardres, 183, *Sparks* vs. *Stafford.* In Salkeld the Cafe is not fo well reported as the fame in Mod. Rep. 'Tis unneceffary to fet forth Order to redeem; as the Mafter may juftify throwing over Goods in Cafe of a Storm to fave a greater Lofs, fo may he redeem, as otherwife the Whole would be loft. 2 Ld. Raym. 931, *Tranter* vs. *Watfon.* As for the Cafe of *Johnfon* vs. *Shippin* in Salkeld, that the Mafter by his Contracts cannot make the Owners liable, 6 Mod. 79 is the fame Cafe, and not fo reported, befides there the Contract appeared to have been made at Land; as for the Veffell's being loft, 'tis of no Avail—the Owners muft be bound inftantly or not at all; if the Mafter has a Right to bind the Owners by his Contract, they are bound, and the Contract cannot be refcinded but by the Parties, and not depend upon fuch a Contingency as the Arrival of the Veffell.[88]

Thacher replied for Scollay that admiralty doctrine is limited to the security of the vessel, and cannot be the basis for personal contract liability for owners without any privity:

> Whether the Owners muft anfwer in their Perfons for the Act of the

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Study, 1760-1775, 18 AM. J. LEGAL HIST. 1, 13-26, 32 (1974). (noting American courts' divergence from English law).

82. Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187 (1765); Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74 (1763).

83. Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 76 (1763).

84. *See* Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 75, 77-78 (1763) (discussing prohibition issue); *see also* JOWITT'S DICTIONARY OF ENGLISH LAW, *supra* note 48, at 1443 (reviewing admiralty issue).

85. Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 77-79 (1763).

86. *Id.* at 74-75, 77.

87. *Id.* at 76.

88. *Id.* at 76.

> Mafter at Sea, of which they were utterly unknowing, is the Queftion; I take it not the Owners perfonally, for the Thing itfelf is bound. Every Ranfom is a new Purchafe, and if the Owners are liable in this Cafe, they would be liable if the Mafter had contracted with the Captors for another Ship, and fent an Hoftage as a Pawn.[89]

Gridley countered for Dunn:

> There are fome Things though tranfacted upon the High Sea are not of a Maritime Nature, are not within the Jurifdiction of the Court of Admiralty. Things of a Maritime Nature tranfacted at Sea are undoubtably within its Jurifdiction. So there are fome Things of a Maritime Nature, though not tranfacted upon the High Seas, that are within the Jurifdiction of the Admiralty; fuch are Wages of Seamen. There is Nothing that Owners are not liable for, which is neceffary for the Support of the Voyage; it is no Argument that becaufe the Veffell is liable, the Owners are not alfo; Veffell, Mafter, and Owners are all liable for Wages. Viner, Tit. Hypoth. 329, bot.[90]

The Court was split. Justice Oliver held that the admiralty jurisdiction was good.[91] Justice Lynde disagreed, arguing that, if the action "was on the Ship or Cargo," it would have been proper for the Admiralty, "but as it is not, I cannot but be for the Prohibition ftanding."[92] Chief Justice Hutchinson agreed:

> Ranfom as far as it refpects Mafter and Hoftage maritime, fo far as Owner and Mafter does not appear to be a Contract upon the High Seas. None of the Authorities maintain the Jurifdicition in this Cafe; and where it is doubtfull, I think 'tis a Rule that common Jurifdiction ought to be maintained, and that the Admiralty Jurifdiction ought to be made plain and clear, which I think is not the Cafe now.[93]

Hutchinson's arguments apparently carried the day, and the prohibition was sustained.[94] Moreover, the Court denied leave to appeal to the King and Council in England, despite fervent arguments by Auchmuty and Gridley that this was a "Cafe[] of Importance."[95]

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89. *Id.* at 77.

90. Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 78 (1763).

91. *Id.* at 78.

92. *Id.* at 78-79.

93. *Id.* at 79.

94. *Id.*

95. Notes on Scollay v. Dunn, *in* QUINCY'S REPORTS, at 74, 80 (1763); *see also id.* at 80-82 (setting forth counsel's argument). In fact, the hostage in English law usually had a right to proceed in the Admiralty in rem against the ship and cargo to obtain payment of his ransom. *See id.* at 79 n.2 (observing state of English admiralty law at time of case). The first case of enforceability of ransom bills directly in the King's Bench was exactly contemporaneous with *Dunn v. Scollay* in *Ricord v. Bettenham*, 3 Burr. 1734, 97 Eng. Rep 1071 (K.B. 1765). There Lord Mansfield, relying on civilian

Undeterred, Dunn then brought a straight action at common law.[96] Although he initially won a jury verdict of £700 in the Court of Common Pleas,[97] this was apparently set aside by the Superior Court of Judicature, on strict application of common-law privity doctrine.[98]

What does this case say about the theories of Murrin, Horwitz, and Nelson? Certainly, the ultimate outcome was a strict application of English doctrine, at least as the judges understood it. On the other hand, it was a split decision, and the arguments of counsel were full of instrumentalist rationales that were carefully considered by the bench.

Other, less spectacular, cases demonstrated a willingness to adopt customary remedies into the "law," particularly where this serves an economic or social end. Such a case was *Bromfield v. Little*.[99] The issue was simple. In a straight contract action (general *indebitas assumpsit*) for an account payable, was interest payable after a year on goods sold which would "raife an implied Contract to pay the fame?"[100] The plaintiff argued that although there was no specific agreement between the parties on this point, the "Cuftom of Merchants [was] here to charge Intereft after a Year."[101] The Justices permitted "Several Merchants" to be "fworn on this Head, but they did not agree about the Time, neither whether they did or did not firft inform the Debtor."[102] Then the following colloquy occurred:

> In Behalf of Defendant, 'twas faid, there was no fuch Cuftom here at all; yet if it could be faid there was a Cuftom here to charge after Notice either at or after Sale, certainly not before Notice.
>
> *Juft. Oliver.* Whether this is a reafonable Cuftom muft firft be confidered. I think it is. I think, too, it appears to be a Cuftom.
>
> *Juft. Cufhing.* This Cafe is very different from what it is at Home; 'tis there the univerfal Ufage, which makes it the Suppofition of every Party at firft; and, as a Perfon purchafing Goods without any fpecial Promife is fuppofed to promife the Payment of the Cuftomary Price, fo he is fuppofed to engage to pay the cuftomary Allowance for Forbearance; but here, however reafonable it may be, it is yet otherwife, nor is it implied in the Contract.
>
> *Ch. Juftice.* This Cafe is of much Importance to the Community. 'Tis

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authorities such as Grotius and Pufendorf, entered judgment for the hostage. *See* Rodgers, *supra* note 67, at 350-51 (commenting on Lord Mansfield's Notebooks).

96. *See* Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187, 187 n.1 (1765) (listing procedural history of case).

97. *Id.*

98. *Id.* at 187-88.

99. Notes on Bromfield v. Little, *in* QUINCY'S REPORTS, at 108, 108 (1764).

100. *Id.*

101. *Id.*

102. *Id.*

> agreeable to natural Equity that Intereft fhould be allowed; and I am glad it is growing into a Cuftom; but the Rule is that both Parties ought at the Time of contracting to underftand it fo, and I doubt whether it is fo general as that it can be fuppofed in this Cafe.[103]

Obviously, the *Scollay* and *Bromfield* cases do not, alone, confirm or vitiate the various theses of Murrin, Horwitz or Nelson. But the "tone" in the courtroom, captured so well by Quincy in his careful notation of both the arguments and the judicial exchanges, seems very adventurous. "Instrumentalist" judging was clearly not just a product of the Revolution in Massachusetts, anymore than it was in Lord Mansfield's court in London.[104] Further, both counsel and the bench seem willing to use English precedents loosely, to achieve what they regarded as fair. *Quincy's Reports* contain dozens of *Scollay* and *Bromfield*-type cases.[105] Any general thesis about American pre-Revolutionary jurisprudence needs to accommodate this fact. By the way, is not the new Suffolk University Law School Building to be on Bromfield Street in Scollay Square, near to the Quincy Market?

C. Law and Society: Of Jane Austen, Bawdy Houses, Slavery, Naked Wives and Entails

Today's Williamsburg is full of costumed "attendants" play acting as the happy men, housewives, and servants of the pre-Revolutionary era.[106] The "Pompeii of Paper" has a much tougher picture of Boston from 1761 to 1772. To begin, *Quincy's Reports* graphically conveys the ugliness of Boston slavery. In *Oliver v. Sale*,[107] Oliver sued Sale "for felling him two free Mulattos for Slaves," producing several receipts of "Money for

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103. *Id.* at 108-09. The jury did not allow interest, and the Court let the verdict stand. *Id.* at 109.

104. *See* C.H.S. FIFOOT, LORD MANSFIELD 82-157 (1936) (discussing Mansfield's instrumentalism); *see also* DANIEL R. COQUILLETTE, THE CIVILIAN WRITERS OF DOCTORS' COMMONS, LONDON 282-96 (1988) (outlining contributions of Lord Mansfield); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 928-31 (1974) (interpreting application of contract law in American and English courts); A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 565-68 (1979) (commenting on English and American court's handling of contract law).

105. *See generally* Notes on Hooton v. Grout, *in* QUINCY'S REPORTS, at 343 (1772); Notes on Apthorp v. Shepard, *in* QUINCY'S REPORTS, at 298 (1768); Notes on Curtis v. Nightingale, *in* QUINCY'S REPORTS, at 256 (1767); Notes on Noble v. Smith, *in* QUINCY'S REPORTS, at 254 (1767); Notes on Pateshall v. Apthorp & Wheelwright, *in* QUINCY'S REPORTS, at 179 (1765); Notes on Russel v. Oakes, *in* QUINCY'S REPORTS, at 48 (1763); Notes on Derumple v. Clark, *in* QUINCY'S REPORTS, at 38 (1763).

106. *See* MICHAEL OLMET, OFFICIAL GUIDE TO COLONIAL WILLIAMSBURG (1995), which is lavishly illustrated.

107. Notes on Oliver v. Sale, *in* QUINCY'S REPORTS, at 29 (1762).

two *Negro Boys fold & delivered.*"[108] There was no question that humans could be bought and sold, and to sell a free human as a slave was simply to fail to deliver on the bargain. As the Chief Justice observed:

> *Ch. Juft.* Is there not as palpable a Fraud, when a Man fells a Negro as a Slave whom he knows to be free, as when he fells a Bag of Feathers and affures them to be Hops? That he knew them to be free they muft prove, or do not fupport their Declaration.[109]

Ironically, *Oliver v. Sale* was later cited in *Merrick v. Betts*[110] to establish the existence of a right of slaves to marry prior to the 1780 Constitution, referring to Samuel Quincy's notes.[111]

There are other slave and indentured servant cases in *Quincy's Reports*. We have already seen that John Scollay's ships were in the Guinea slave trade as evidenced in *Dunn v. Scollay*.[112] In *Allison v. Cockran*,[113] straight trover is brought "for a Negro," exactly as if he were a bale of cotton.[114] Quincy added a cryptic note, referring to some of the English cases and declaring that slavery could not exist in England. "*Qu.* if this Action is well brought, for Trover lies not for a Negro."[115] Later, Quincy would have a discussion with a potential Whig sympathizer in England, who observed how lucky it was that Quincy had come, since "two thirds

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108. *Id.*

109. *Id.* at 32.

110. 214 Mass. 223, 101 N.E. 131 (1913).

111. *Id.* at 226, 101 N.E. at 132. There is actually nothing in the case itself indicating that slaves had such a right. Samuel Quincy's note, added in the 1865 edition, observes:

> The right to marry was fecured to them in 1705 by Prov. St. 4 Anne. Anc. Chart. 748. The fubfequent records of Bofton and other towns fhow that their banns were publifhed like thofe of white perfons. In 1745, a negro flave obtained from the Governor and Council a divorce for his wife's adultery with a white man. *Jethro Bofton's Cafe*, 9 Mafs. Archives, 248. In 1758, it was adjudged by the Superior Court of Judicature, that a child of a female flave, "never married according to any of the forms prefcribed by the laws of this land," by another flave, who "had kept her company with her mafter's confent," was not a baftard. *Flora's Cafe*, Rec. 1758, fol. 296. And the wife of a flave was not allowed to teftify againft him. MS. note by John Adams of *Cæfar v. Taylor*, in Effex, 1772, (Rec. 1772, fol. 91,) in the poffeffion of Hon. Charles Francis Adams; which alfo fhows that the defendant in an action of falfe imprifonment was not permitted under the general iffue to prove that the plaintiff was his flave.

Notes on Oliver v. Sale, *in* QUINCY'S REPORTS, at 29, 30 n.2 (1762).

112. Notes on Dunn v. Scollay, *in* QUINCY'S REPORTS, at 187, 187 n.1 (1765).

113. Notes on Allison v. Cockran, *in* QUINCY'S REPORTS, at 94 (1764).

114. *Id.* at 94. "Trover" had become, by the 18th century, the general common-law action for the recovery of goods, replacing the old action of "detinue." J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 451 (3d ed. 1990). "'[T]rover is merely a substitute of the old action of detinue . . . [it] is not now an action *ex maleficio*, though it is so in form; but it is founded on property.'" *Id.* (quoting Lord Mansfield in Hambly v. Trott, 1 Cowp. 371, 374, 48 Eng. Rep. 1136, 1137 (K.B. 1776)). The essence of trover is ownership of goods. *See* JOWITT'S DICTIONARY OF ENGLISH LAW, *supra* note 48, at 1810-11 (defining term).

115. Notes on Allison v. Cockran, *in* QUINCY'S REPORTS, at 94, 94 n.* (1764).

of this island at that time thought the Americans were all negros!"[116] Quincy snapped back that he "did not in the least doubt it, for that if I was to judge by the late acts of Parliament, I should suppose that a majority of the people of Great Britain still thought so;—for I found that their representatives still treated them as such."[117] In that remark was both a clear acknowledgment of American racism, and the ultimate dilemma of fighting a Revolution for human freedom, while so many were to be left slaves.[118]

The situation for women was only marginally better. Husbands who abandoned their wives and children could be held liable to the Overseers of the Poor for support payments, even though they had not "agreed" to the support and there was no privity. Ironically, this is the kind of extension of contract doctrine, based on policy grounds despite lack of privity, that the Court declined to take for the abandoned first mate in the *Scollay* case![119]

In the "naked wife" case, *Hanlon v. Thayer*,[120] the issue was whether a woman with assets who marries a bankrupt husband loses all her belongings to his creditors, including her clothes.[121] The conclusion was "yes" except for "*neceffary* wearing Apparell."[122] The Chief Justice observed:

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116. QUINCY, *supra* note 7, at 290. This account comes from a "journal" kept by Quincy during his visit to England from 1774 to 1775. *See id.* at 216 (describing writings).

117. *Id.* at 290. Quincy's companion, the "celebrated Col. Barré," then dropped the subject. *Id.* at 288-90. "He smiled, and the discourse dropped." *Id.* at 290. Quincy then noted that Barré had supported the hated Boston Port Bill. *Id.*

118. *See id.* at 295 (discussing fate of America). Quincy wrote this to his wife on January 7, 1775:

> The ministry, I am well satisfied, are quite undetermined as to the course they must take with regard to America. They will put off the final resolutions to the last moment. I know not, and, any further than mere humanity dictates, *I care not*, what part they take. If my own countrymen deserve to be free—*they will be free*. If, born free, they are contented to be slaves, e'en let them bear their burdens.

Id.

119. *See* Notes on Brown v. Culnon, *in* QUINCY'S REPORTS, at 66, 66 (1763) (recording court's verdict). Samuel Quincy duly notes that the town cannot recover for supplies "fuitable to the wife's condition in life, beyond her neceffary fupport as a pauper." *Id.* at 66 n.1.

120. Notes on Hanlon v. Thayer, *in* QUINCY'S REPORTS, at 99 (1764).

121. *Id.* at 99-100.

122. *Id.* at 100. Auchmuty, arguing for the wife, Hanlon, observed that "what was neceffary for one Station in Life was not fo for another, and faid the Law never meant the Word 'Neceffary' in its ftricteft senfe." *Id.* Gridley, for the Sheriff, Thayer, who had seized the clothes, observed:

> Nothing is *neceffary* in the *Law* but what is neceffary to defend from the Inclemency of the Weather, or neceffary to the Degree: But before they can talk highly of Degree they muft pay their Debts. If any befides what is barely neceffary is allowed for Comfort, it is not the Law, but Humanity. The Law here wifely ufes the Word *Neceffary*, for the Boundary of Neceffity is determinate, but Conveniency not,—Conveniency! What is convenient? &c. (a little Rhetorick and concludes.) *Mr. Gridley* alfo faid: If a Judge of Probate grant to the Wife of an Inteftate whofe Eftate is infolvent, two Beds, where *one only* was neceffary, the other immediately became liable to be attached, and he cited *Hardiftey & Barney*, (Comber. 356,) where *Holt* fays if the Party have two Gowns, Sheriff may take one.

> (here *Ch. Juft.* makes an Apology for what follows) that this may be one of thofe Cafes where the Juftice fays a Thing *obiter*, or fuddenly; for one Gown can never be fuppofed fufficient—musft fhe go naked when that is wafhing? Upon the Whole I think it would be very hard upon the Wife, fhould fuch a Precendent as this take Place, that her *Cloaths* which fhe *brought* in *Marriage* muft go to difcharge the Hufband's Debts. I fhould think it fafer to verge towards Conveniency than to ftrain the Word *Neceffary*.[123]

At least one form of entrepreneurship was recognized for women, running a "Bawdy House." In *Dom. Rex v. Doaks*,[124] Mistress Doaks was acquitted because proven "Acts of Lafcivioufnefs" were prior to her acquiring the alleged House, and no proof of character was permitted by the prosecution unless character was made an issue by the defense.[125] Strikingly, Mistress Doaks was the only woman to appear in *Quincy's Reports* even alleged to have her own business, if we except Margaret Knodle, a convicted thief.[126] Several cases had women desperately trying to prove marriage to avoid bastardy, or to avoid a charge of murder of a bastard child.[127] Despite earlier progress toward "partability" and women's rights in property law, Jane Austen would have recognized the fierce battles over property and the importance of the male entail in *Baker v. Mattocks*,[128] and *Dudley v. Dudley*.[129] It was not a pretty picture. Costumes aside, it

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Id. at 101 (footnote omitted).

Quincy drops a note here to Edward Coke, *The First Part of the Institutes of the Lawes of England* 351(b) asking if it "would not have been good Authority?" *Id.* at 101 n.*. Coke distinguished between a wife's "personal goods," brought into a marriage, and other property, where there is an action for recovery. *See* 2 SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 218-20 (Garland Publ'g 1979) (1628) (discussing wives and feoffment). This remark is just one example of Quincy's acute knowledge of English precedents.

123. Notes on Hanlon v. Thayer, *in* QUINCY'S REPORTS, at 99, 103 (1764). "*Juftices Oliver & Cufhing* both faid the Cafe was very hard upon the Wife, who brought all thefe Cloaths at Marriage, yet 'as they are perfonal Property, they become the Hufband's on Marriage, and therefore liable.'" *Id.* at 102.

The Chief Justice added, scolding the lawyers:

> *Ch. Juft.* I fhould have been extremely glad if this Cafe had been argued a little more largely by the Gentlemen of the Bar, and more Authorities cited, in Matter of fo great Confequence. I always took it to have been the Cuftom in fuch Cafes as this, for the Wife to have her Cloaths; in Cafes that have come before me as Judge of Probate I never knew it denied to the Wife where the Eftate was infolvent.

Id. at 102 (footnote omitted).

124. Notes on Dom. Rex v. Doaks, *in* QUINCY'S REPORTS, at 90 (1763).

125. *Id.* at 90-91.

126. *See* Notes on Dom. Rex v. Pourksdorff, *in* QUINCY'S REPORTS, at 104, 105 n.3 (1764) (mentioning case of Margaret Knodle).

127. *See* Notes on Dom. Rex v. Mangent, *in* QUINCY'S REPORTS, at 162, 163 (1765) (indicting for murder of bastard child); Notes on Banister v. Henderson, *in* QUINCY'S REPORTS, at 119, 121 (1765) (claiming valid marriage existed).

128. Notes on Baker v. Mattocks, *in* QUINCY'S REPORTS, at 69 (1763).

129. Notes on Dudley v. Dudley, *in* QUINCY'S REPORTS, at 12 (1762); *see* JANE AUSTEN, PRIDE

was better to be white and male in either Williamsburg or Boston.

D. Rule of Law: The Brethren

Quincy's Reports gives a candid and forceful view of the social realities of Massachusetts in the 1760s. It also gives a particularly good view of one little society—fourteen active lawyers and six judges of the Boston legal world, whose arguments, exchanges and even jokes are carefully described.[130] It was a very small bar, and the "players" knew each other

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AND PREJUDICE 24 (Harcourt, Brace & World 1962) (1813) (beginning narrative of sisters' lives on passage of estate to male cousin). There is no opportunity here to adequately describe the important entail cases in *Quincy's Reports*. These will be described in detail in the introduction to the new edition. There is no question, however, that the conflict over the will of Governor Dudley, fought out in *Dudley v. Dudley*, was one of the most important cases for the Boston Bar, both for the legal principle involved and the money at issue. *See* Notes on Dudley v. Dudley, *in* QUINCY'S REPORTS, at 12, 12-13 (1762) (outlining issue). The ultimate issue was whether, by Province Law, estates entail are "partable", i.e., capable of being divided equally to all heirs, male and female. *Id.* at 17-18. The Court decided against partability in *Baker v. Mattocks*, but with the Chief Justice doubtful about the outcome. *See* Notes on Baker v. Mattocks, *in* QUINCY'S REPORTS, at 69, 74 (1763) (expressing doubt regarding outcome and favoring English precedent). Where there was no express provision by will, Province Law had already abolished the English common law of primogeniture (i.e., all land to the eldest male, if one exists). *Id.* at 70 n.2 (quoting 1692 Mass. Acts 4).

> "Whereas eftates in thefe plantations do confift chiefly of lands which have been fubdued and brought to improvement by the induftry and labour of the proprietors, with the affiftance of their children, the younger children generally having been longeft and moft ferviceable unto their parents in that behalf, who have not perfonal eftate to give out unto them in portions, or otherwife to recompenfe their labour.
>
> "Sect. I. Be it therefore enacted," &c., "that every perfon lawfully feifed of any lands, tenements, or hereditaments within this province, in his own proper right in fee fimple, fhall have power to give, difpofe, and devife as well by his laft will and teftament in writing as otherwife by any act executed in his life, all fuch lands, tenements, and hereditaments to or among his children or others as he fhall think fit at his pleafure, and if no fuch difpofition, gift, or devife be made," then prefcribing the rules of defcent to all the children. Anc. Chart. 230.

Id.; *see also* 1692 Mass. Acts 14 (outlining procedure for distribution of estates).

130. *See* Memorandum, *in* QUINCY'S REPORTS, at 35, 35 (1762) (listing lawyers on Suffolk docket). The most prominent lawyers appearing before the Superior Court in *Quincy's Reports* were, in alphabetical order: John Adams (1735-1826), Robert Auchmuty (1723-1788), William Brattle (1706-1776), William Cushing (1732-1810), Francis Dana (1743-1811), Samuel Fitch (1724-1799), Benjamin Gridley (1732-*circa* 1800), his father Jeremiah Gridley (1701-1767), Major Joseph Hawley (1723-1788), James Otis Jr. (1725-1783), Josiah Quincy (1744-1775), his brother, Samuel Quincy (1734-1789), Jonathan Sewall (1729-1790), and Edmund Trowbridge (1709-1793). *See id.* (recording lawyers who appeared during court's term); *see also* Register of Bench and Bar, *supra* note 7, at xcv-cxiv (providing excellent concise biographies of practitioners).

Several of the fourteen, such as Adams, Auchmuty, Cushing, Dana, Fitch, Benjamin Gridley, and Edmund Trowbridge became judges, and Cushing went from the Superior Court to the new United States Supreme Court. Register of Bench and Bar, *supra* note 7, at xcv-cxiv (providing biographic information). Some of these, indeed Quincy himself, were never admitted as full barristers, but appeared in court in any event. *See id.* at cvii (suggesting that Quincy's political belief prevented him from becoming barrister though he practiced unhindered). *But see* QUINCY, *supra* note 7, at 352-53 (noting Quincy honored with title of "barrister" as inscribed on tombstone). Some admitted as barris-

intimately. But it was also very important. Its importance is usually described in terms of "winners" history—after all, this tiny group included a future President of the United States, John Adams; a future Justice of the new Supreme Court, William Cushing; a signer of the Declaration of Independence and future Attorney General and Justice of the Supreme Judicial Court, Robert Trent Paine; a future Chief Justice of Massachusetts, Francis Dana; and three great patriots who were struck down in their prime, James Otis Jr., Major Joseph Hawley, and Josiah Quincy Jr., himself.[131]

But this is only just "winners" history. Half of the this tiny band, including some of its most talented members, were loyalists.[132] Benjamin Gridley fought with Timothy Ruggles' Loyalist Corps and went into exile.[133] So did Robert Auchmuty, an able protagonist in many of the most important cases.[134] So did Samuel Fitch and Jonathan Sewall, Josiah

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ter, never appear. *See* Memorandum, *in* QUINCY'S REPORTS, at 35, 35 (1762) (listing all Suffolk barristers); *see also* McKirdy, *supra* note 2, app. IV at 339-58 (providing biographical sketches of Massachusetts lawyers); Register of Bench and Bar, *supra* note 7, at xcv-cxiv (providing excellent concise biographies of practitioners). Adams, Cushing, Dana, Hawley, Otis, and Josiah Quincy took the patriot side, while Auchmuty, Brattle, Fitch, Benjamin Gridley, Samuel Quincy, and Sewall were loyalists. *See* McKirdy, *supra* note 2, app. IV at 339-58 (listing political affiliations). Trowbridge desperately tried to remain neutral, and Jeremiah Gridley died before the worst of the struggle. *See id.* app. IV at 355 (describing Trowbridge).

The most active judges, in order of appointment, were Benjamin Lynde Jr., Justice from 1746-1771 and Chief Justice from 1771-1772; John Cushing Jr., Justice from 1748-1771 (his son William Cushing above); Chambers Russell, Justice from 1752-1766; Peter Oliver, Justice from 1756-1772, Chief Justice from 1772-1775; Thomas Hutchinson, Chief Justice from 1760-1771 (referred to as simply "Chief Justice" throughout *Quincy's Reports*); and Edmund Trowbridge, Justice from 1767-1775. *Id.* app. I at 329-32. Of the above, only Trowbridge known as "The Oracle of the Common Law in New England," could be considered a "professional lawyer." *See* The Banquet of the Bar of Massachusetts on the 250th Anniversary of the Founding of the Supreme Judicial Court of Massachusetts, *in* THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692-1942, at 1, 36 (1942) (showing painting of Trowbridge). John Cushing, Lynde, and Russell were landed gentlemen of the old school and Oliver and Hutchinson, wealthy merchants. McKirdy, *supra* note 2, app. I at 330-32; *see also* FRANCIS S. DRAKE, DICTIONARY OF AMERICAN BIOGRAPHY 470, 571, 671 (Boston, James R. Osgood & Co. Supp. 1872) (describing Hutchinson, Lynde, and Oliver). There are, of course, many useful secondary sources. *See generally* BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1974) (setting scene of troubled times leading up to Revolution); E. ALFRED JONES, THE LOYALISTS OF MASSACHUSETTS (1930) (setting scene for Revolution).

For the introduction of the new edition of *Quincy's Reports*, careful tables have been prepared showing frequency of appearances by the above lawyers, the types of clients they tended to represent, their areas of expertise, and collaborations among them. Dissents and concurring opinions among the justices have also been tabulated. For this I am most grateful to my able research assistants, James Dimas and Thomas J. Murphy, both Boston College Law School Class of 1996.

131. McKirdy, *supra* note 2, app. IV at 339, 342-45, 348-50.

132. *See id.* (listing political affiliations); *see also* JONES, *supra* note 130, at xiii (listing other loyalists of time).

133. McKirdy, *supra* note 2, app. IV at 344.

134. *Id.* app. IV at 339-40.

Quincy's close friends.[135] William Brattle also took to the Tory cause.[136] So, most poignantly, did Josiah's own brother, Samuel Quincy, who ended up as a barrister in Antigua.[137] One, the skilled and knowledgeable Edmund Trowbridge, clung to neutrality, thus losing all chances for further advancement.[138] Mercifully, the great "dean" of the Boston bar, Benjamin Gridley's father and John Adams' teacher, Jeremiah Gridley, died in 1767, before he had to see his sons and students go to war with each other.[139]

And the outcome could have been very different. As Adams fully recognized, it really was glory or the gallows for the patriots.[140] Brattle, Gridley, and Auchmuty could have been the leaders of a powerful, reunited Province. As it turned out, it was the loyalists who lost everything.

Quincy's Reports contains direct reports of some of the most traumatic events of the day, including the dramatic appearance of Chief Justice Hutchinson in borrowed clothes after his house had been destroyed by the mob the night before.[141] Also of great importance was the second argument of *Paxton's Case*, the famous "Writs of Assistance Case;"[142] and the accounts of the trial of Captain Preston and the British Soldiers, the famous "Boston Massacre Trial."[143] Many other political events and trials were noted by Quincy and he carefully recorded the Chief Justice's annual charge to the Grand Jury, an excellent political barometer.[144]

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135. *Id.* app. IV at 343-44, 352-54.

136. *Id.* app. IV at 341-42.

137. *Id.* app. IV at 350-51.

138. McKirdy, *supra* note 2, app. IV at 355.

139. *See* Register of Bench and Bar, *supra* note 7, at ci (listing date of death and recounting his historical significance).

140. *See* Coquillette, *supra* note 2, at 405-16 (describing Adams' political viewpoint); *see also* JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 425-28 (1943) (describing conditions in Great Britain and America). Adams did not view his objection to the activities of the Parliament as legally rebellious, but he certainly understood the risks. Adams observed that, if the colonialist cause was lost, patriots like himself would "'not only be slaves—but the most abject sort of slaves to the worst sort of masters!'" MILLER, *supra*, at 425. *Compare id.* (listing Adams' "slavery" remarks), *with supra* notes 114-17 and accompanying text (listing Quincy's comments).

141. *See* Address of the Chief Justice, *in* QUINCY'S REPORTS, at 171, 171-73 (1765) (recording Chief Justice's remarks).

142. *See* Paxton's Case of the Writ of Assistance, *in* QUINCY'S REPORTS, at 51 (1761).

143. *See* Petition of the Jurors in the Trials of Captain Preston and the British Soldiers, *in* QUINCY'S REPORTS, at 382, 382-86 (1771) (recording observations of trial).

144. Memoranda, *in* QUINCY'S REPORTS, at 316, 316-17 (1769); Charge of the Chief Justice, *in* QUINCY'S REPORTS, at 306, 306-15 (1769); Chief Justice's Charge to the Grand Jury, *in* QUINCY'S REPORTS, at 301, 301-05 (1768); Charge given to the Grand Jury by the Chief Justice, *in* QUINCY'S REPORTS, at 258, 258-71 (1768); Charge of the Chief Justice to the Grand Jury, *in* QUINCY'S REPORTS, at 241, 241-48 (1767); Charge to the Grand Jury by the Chief Justice, *in* QUINCY'S REPORTS, at 232, 232-37 (1767); Charge to the Grand Jury by the Chief Justice, *in* QUINCY'S REPORTS, at 218, 218-24 (1766); Charge by the Chief Justice given on the Adjournment, *in* QUINCY'S REPORTS, at 175, 175-79 (1765); Charge to the Grand Jury by the Chief Justice, *in* QUINCY'S REPORTS, at 110, 110-17 (1765).

But the ultimate political and professional lessons of *Quincy's Reports* are very different from what one might expect. We know that Josiah Quincy Jr. was a lawyer by day, and a member of the secret Committee of Public Safety by night.[145] We know that six of these lawyers would be expelled and rejected, and that seven would become famous "patriots" and/or great men in the new republic. But the lesson, graphically and carefully taught by those pages, is not the expected and obvious one of dissension, division, and hatred. Most surprisingly, it is rather one of solidarity and mutual professionalism, in the face of a crumbling political order. Patriots and loyalists alike adhered to their understanding of English legal rights, legal process, and legal professionalism, even in the face of intense political pressure. It is remarkable that the so-called "Sodalitas Club," with both patriot and loyalist lawyers as members, was founded in 1767, and met for regular, collegial dinners.[146] Or that the first bar association, the Suffolk Bar Association, was founded in 1770, with John Adams as secretary.[147]

There are many examples of this professionalism in *Quincy's Reports*. Let me select just three for the purposes of this lecture: the reaction to the burning of the Chief Justice's house in 1765, the Stamp Act arguments of 1765, and the Boston Massacre Trial of 1771. Perhaps the most dramatic event was the destruction of the Chief Justice's house, on August 27, 1765, in response to the passage of the Stamp Act.[148] Quincy's political sympathies were clearly against the Stamp Act, but the entire bar united in condemning the lawlessness of the mob. Quincy's description in the *Reports* leaves no question of his sincerity, and also his allegiance to legal process:

> The Deftruction was really amazing; for it was equal to the Fury of the Onfet; but what above all is to be lamented, is the Lofs of fome of the most valuable Records of the Country, and other antient Papers; for, as his Honour was continuing his Hiftory, the oldeft and moft important Writings and Records of the Province, which he had felected with great Care, Pains and Expenfe, were in his Poffeffion. This is a Lofs greatly to be deplored, as it is abfolutely irretrievable.
>
> The Diftrefs a Man muft feel on fuch an Occafion can only be conceived by thofe, who, the next Day, faw his Honour the Chief Juftice come into Court, with a Look big with the greateft Anxiety, cloathed in a

145. QUINCY, *supra* note 7, at 11 (introducing Quincy's articles under pseudonym Hyperion).

146. *See* Register of Bench and Bar, *supra* note 7, at ci (crediting Jeremiah Gridly with establishment of legal discussion group).

147. Coquillette, *supra* note 2, at 395-97.

148. *See* Destruction of the House of the Chief Justice, *in* QUINCY'S REPORTS, at 168, 168-71 (1765) (recounting chain of events); *see also* Address of the Chief Justice, *in* QUINCY'S REPORTS, at 171, 171-74 (1765) (recording Chief Justice's reaction to events).

Manner which would have excited Compaffion from the hardeft Heart, though his Drefs had not been ftrikingly contrafted by the other Judges and Bar, who appeared in their Robes.—Such a Man, in fuch a Station, thus habited, with Tears ftarting from his Eyes, and a Countenance which ftrongly told the inward Anguifh of his Soul,—what muft an Audience have felt, whofe Compaffion had before been moved by what they knew he had fuffered, when they heard him pronounce the following Words, in a Manner which the Agitations of his Mind dictated![149]

For his part, the Chief Justice was careful to point out his personal opposition to the Stamp Act, and his awareness of what provoked the violence.

The Chief Juftice, addreffing the whole Court, faid, —
Gentlemen:

There not being a Quorum of the Court without me, I am obliged to appear. Some Apology is neceffary for my Drefs—indeed I had no other. Deftitute of Everything—no other Shirt—no other Garment, but what I have on.—And not one in my whole Family in a better Situation than myfelf. The Diftrefs of a whole Family around me, young and tender Infants hanging about me, are infinitely more infupportable than what I feel for myfelf; though I am obliged to borrow Part of *this* Cloathing.

Senfible that I am innocent, that all the Charges againft me are falfe, I cannot help feeling:—And, though I am not obliged to give an Anfwer to all the Queftions that may be put me by every lawlefs Perfon—yet I call GOD to witnefs,—and I would not for a thoufand Worlds call my *Maker* to witnefs to a Falfehood,—I fay, I call my *Maker* to witnefs, that I never, in New England or Old, in Great Britain or America, neither directly nor indirectly, was aiding, affifting or fupporting, or in the leaft promoting or incouraging what is commonly called the STAMP ACT; but, on the contrary, did all in my Power, and ftrove as much as in me lay, to prevent it.—This is not declared through Timidity, for I have Nothing to fear.—They can only take away my Life, which is of but little Value when deprived of all its Comforts, all that is dear to me, and nothing furrounding me, but the moft piercing Diftrefs.[150]

Quincy concluded his account with an uncharacteristic, but revealing, outburst:

Who, that fees the *Fury and Inftability* of the Populace, but would feek Protection under the ARM OF POWER? Who that beholds the *Tyranny and Oppreffion* of arbitrary POWER, but would lofe his Life in Defence of his LIBERTY? Who, that marks the riotous Tumult, Confufion and Uproar of a democratic—the Slavery and Diftrefs of a defpotic State, the infinite

149. Destruction of the House of the Chief Justice, *in* QUINCY'S REPORTS, at 168, 170-71 (1765).
150. Address of the Chief Justice, *in* QUINCY'S REPORTS, at 171, 171-72.

> Miferies attendant on both, but would fly for Refuge from the mad Rage of the one, and oppreffive Power of the other, to that beft Afyslum, that Glorious Medium, the BRITISH CONSTITUTION! Happy People! who enjoy this bleffed *Conftitution*. Happy! thrice happy People! if ye preferve it inviolate. May ye never lofe it through a licentious Abufe of your invaluable Rights and Blood-purchafed LIBERTIES! May ye never forfeit it by a tame and infamous Submiffion to the Yoke of Slavery and lawlefs DESPOTISM.[151]

Equally important was the genuine distress of the entire bar at the closing of the courts by the Stamp Act. Cynics could ascribe this to loss of legal business, but these fourteen lawyers would suffer far more for their beliefs. Both sides seemed genuinely convinced that it was the legal process that bound their society, and all civilized societies, together. Arguments about the Stamp Act are among the most important records in *Quincy's Reports*. Particularly important were the arguments of Jeremiah Gridley, James Otis Jr. and John Adams, on behalf of the Town of Boston, to the Governor in Council.[152] Jeremiah Gridley, it will be remembered, was no revolutionary, and his son Benjamin fought for the Tory side, whereas both Otis and Adams were known to be of the other side. Yet all three delivered a professional, and measured legal argument for their client, urging the opening of the courts.[153] Equally significant, all three invoked British constitutional authority, citing *Coke's Reports*, the *Magna Carta*, and even the great medieval source of the British Constitution, *Bracton's De Legibus*.[154] Particularly revealing was Otis' great argument:

> *Mr. Otis* (opened with Tears). It is with great Grief that I appear before your Excellency and Honours on this Occafion. A wicked and unfeeling Minifter has caufed a People, the moft loyal and affectionate that ever King was bleffed with, to groan under the moft infupportable Oppreffion. But I think, Sir, that he now ftands upon the Brink of inevitable Deftruction; and truft that foon—very foon, he will feel the full Weight of his injured Sovereign's righteous Indignation. I have no doubt, Sir, but that the loyal and dutiful Reprefentations of nine Provinces, the Cries and Supplications of a diftreffed People, the united Voice of all of his Majefty's moft loyal and affectionate Britifh-American Subjects, will obtain all that ample Redrefs they have a Right to expect; and that e'er long, they will fee their cruel and infidious Enemies, both at Home and abroad, put to Shame and Confufion.
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> . . .

151. *Id.* at 173-74.

152. Memorial of the Town of Boston, *in* QUINCY'S REPORTS, at 198, 198 (1765).

153. *Id.* at 198-209.

154. *Id.*; *see infra* note 155 (discussing *Bracton*).

> But the Time is far fpent—I will not tire your Patience. It was once a fundamental Maxim, that every Subject had the fame Right to his Life, Liberty, Property and the *Law*, that the King had to his Crown; and 'tis yet, I venture to fay, as much as a Crown is worth, to deny the Subject his *Law*, which is his Birth-right. 'Tis a firft Principle, "that Majefty fhould not only fhine in Arms, but be armed with the Laws." The *Adminiftration* of Juftice is neceffary to the very Exiftence of Governments. Nothing can warrant the ftopping the Courfe of Juftice, but the impoffibility of holding Courts, by Reafon of War, Invafion, Rebellion or Infurrections. 1 Inft. 249, a & b. This was Law at a Time when the whole Ifland of Great Britain was divided into an infinite Number of petty Baronies and Principalities; as Germany is, at this Day. Infurrections then, and even Invafions, put the whole Nation into fuch Confufion, that Juftice could not have her equal Courfe; efpecially as the Kings in antient Times frequently fat as Judges. But War has now become fo much of a Science, and gives fo little Difturbance to a Nation engaged, that no War, foreign or domeftic, is a sufficient Reafon for fhutting up the Courts. But, if it were, we are not in fuch a State, but far otherwife; the whole People being willing and demanding the full Adminiftration of Government. Vid. Bracton, 240.[155]

This devotion to the rule of law and the legal process was also reflected in the extraordinary Trial of Captain Preston and the British Soldiers.[156] Every school child knows that John Adams and Josiah Quincy Jr. undertook the defense of the British soldiers. It has even been suggested that this was a clever political maneuver, but contemporary records, including desperately worried letters from Quincy's father, make it clear that the assignment was both dangerous and problematic.[157]

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155. Memorial of the Town of Boston, *in* QUINCY'S REPORTS, at 198, 202-04 (1765). The citation is to the great medieval treatise, *Bracton, De Legibus et Consuetudinibus Angliae* (circa 1235). This is a compelling appeal to the wellspring of English fundamental law, for *Bracton* was also invoked by the great English Chief Justice, Edward Coke, in personally confronting King James I in the case of the *Prohibitions Del Roy*. 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1608). Quincy's Law Common-Place, now being transcribed, has many citations to *Coke's Reports*. *See supra* note 22 (listing some of Quincy's English citations).

156. Petition of the Jurors in the Trials of Captain Preston and the British Soldiers, *in* QUINCY'S REPORTS, at 382, 382 n.1 (1771).

157. *See* QUINCY, *supra* note 7, at 34-35 (reprinting letter of Quincy Sr.). Quincy Senior wrote to his son as follows on March 22, 1770:

> My dear Son,
>
> I am under great affliction, at hearing the bitterest reproaches uttered against you, for having become an advocate for those criminals who are charged with the murder of their fellow-citizens. Good God! Is it possible? I will not believe it.
>
> Just before I returned home from Boston, I knew, indeed, that on the day those criminals were committed to prison, a sergeant had inquired for you at your brother's house,—but I had no apprehension that it was possible an application would be made to you to undertake their defence. Since then I have been told that you have actually engaged for Captain Preston;—and I have heard the severest reflections made upon the occasion, by

Less well known is the fact that the prosecution was handled by a stalwart loyalist, Josiah's brother Samuel, and Robert Treat Paine, a patriot.[158] Auchmuty, a loyalist, also assisted John Adams on the defense.[159] The lesson from the Massacre trial was not about political manipulation, but about bar solidarity in the face of the "O.J." case of their generation. The self-conscious unity of the bar, their "Sodalitas," is evident at every turn.[160] *Quincy's Reports* graphically reinforce the other contemporary evidence of this unity.[161] The Chief Justice, concluding the tortured court session of 1765 in which his own house was destroyed, could still observe:

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men who had just before manifested the highest esteem for you, as one destined to be a saviour of your country.

I must own to you, it has filled the bosom of your aged and infirm parent with anxiety and distress, lest it should not only prove true, but destructive of your reputation and interest; and I repeat, I will not believe it, unless it be confirmed by your own mouth, or under your own hand.

Your anxious and distressed parent,

JOSIAH QUINCY.

Id.

Quincy's reply to his father of March 26, 1770 remains a classic of professionalism.

Honoured Sir,

I have little leisure, and less inclination either to know, or to take notice, of those ignorant slanderers, who have dared to utter their "bitter reproaches" in your hearing against me, for having become an advocate for criminals charged with murder. But the sting of reproach when envenomed only by envy and falsehood, will never prove mortal. Before pouring their reproaches into the ear of the aged and infirm, if they had been friends, they would have surely spared a little reflection on the nature of an attorney's oath, and duty;—some trifling scrutiny into the business and discharge of his office, and some small portion of patience in viewing my past and future conduct.

Let such be told, Sir, that these criminals, charged with murder, are *not yet legally proved guilty*, and therefore, however criminal, are entitled, by the laws of God and man, to all legal counsel and aid; that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation; that from abundant caution, I at first declined being engaged; that after the best advice, and most mature deliberation had determined my judgment, I waited on Captain Preston, and told him that I would afford him my assistance; but, prior to this, in presence of two of his friends, I made the most explicit declaration to him, of my real opinion, on the contests (as I expressed it to him) of the times, and that my heart and hand were indissolubly attached to the cause of my country; and finally, that I refused all engagement, until advised and urged to undertake it, by an Adams, a Hancock, a Molineux, a Cushing, a Henshaw, a Pemberton, a Warren, a Cooper, and a Phillips. This and much more might be told with great truth, and I dare affirm, that you, and this whole people will one day REJOICE, that I became an advocate for the aforesaid "criminals," *charged* with the murder of our fellow-citizens.

Id. at 36-37.

158. *See* 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 7, at 1-98; (providing detailed description of case and surrounding events); Petition of the Jurors in the Trials of Captain Preston and the British Soldiers, *in* QUINCY'S REPORTS, at 382, 382-86 (1771).

159. 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 7, at 6, 15-16.

160. *See* Coquillette, *supra* note 2, at 376-82 (describing members and purpose of Sodalitas Club).

161. *See generally* Address by the Chief Justice, *in* QUINCY'S REPORTS, at 197 (1765).

> GENTLEMEN of the Bar: I cannot but with Pleafure obferve to you the Harmony which has fubfifted between all of you in our prefent Seffion, and that Unanimity and Order which has prevailed univerfally amongft us through this whole Term. I the rather obferve this, becaufe, in moft Parts of the Province there has been great Difturbances. I thought this Notice juftly due, and cannot but hope 'twill ferve as a future Precedent to us all, and a good Example to the Community.[162]

No wonder Josiah Quincy Jr. believed that, by appeal to the traditions of the English common law—that "blessed *Constitution*," there still might be an alternative to violent revolution.[163] No wonder that, on September 28, 1774, he secretly set sail for England, hoping that these principles, and his legal advocacy, could avert a bloody, fratricidal war.[164] It was a belief for which he died.[165]

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162. *Id.* at 197.

163. *See* QUINCY, *supra* note 7, at 158-60 (noting Quincy's view on Revolution). Quincy's letters relating to his voyage of September 28, 1774, and his "Journal" of his visit to England from 1774-1775 are of particular importance. In one letter, Quincy observed to John Dickinson, the eminent Philadelphian lawyer and future Framer of the Constitution:

> *Sobrius esto* is our present motto. At the urgent solicitation of a great number of warm friends to my country and myself, I have agreed to relinquish business, and embark for London, and shall sail in eighteen days certainly. I am flattered by those who perhaps place too great confidence in me, that I may do some good the ensuing winter, at the court of Great Britain. Hence I have taken this unexpected resolution. My design is to be kept as long secret as possible,—I hope till I get to Europe. Should it transpire that I was going home, our public enemies here would be as indefatigable and persevering to my injury, as they have been to the cause in which I am engaged, heart and hand; perhaps more so, as personal pique would be added to public malevolence.
>
> I would solicit, earnestly, intelligence from you, sir, while in London. I shall endeavour to procure the earliest information from all parts of the continent. As I propose dedicating myself wholly to the service of my country, I shall stand in need of the aid of every friend of America; and believe me, when I say, that I esteem none more capable of affording me that aid, than those who inhabit the fertile banks of the Delaware.

Id. at 173.

164. *See id.* at 217 (describing departure for England). In England, he soon realized the immensity of his task, but his patriotism was unshaken. Thus, Quincy wrote to his loyal wife, Abigail, on January 7, 1775:

> Oh! my dear friend! my heart beats high in the cause of my country. Their safety, their honour, their *all* is at stake! I see America placed in that great 'tide in the affairs of men, which, taken at the flood, leads on to fortune.' Oh! snatch the glorious opportunity. Oh! for a 'warning voice,'—or our lives are bound in vassalage and misery.
>
> The ministry, I am well satisfied, are quite undetermined as to the course they must take with regard to America. They will put off the final resolutions to the last moment. I know not, and, any further than mere humanity dictates, *I care not*, what part they take. If my own countrymen deserve to be free—*they will be free*. If, born free, they are contented to be slaves, e'en let them bear their burdens.

Id. at 295.

165. *Id.* at 348. Quincy died of his tuberculosis on the return voyage from England. SHAW, *supra* note 7, at 155. He was in sight of Cape Ann and Gloucester Harbor, where his loyal wife, Abigail, stood upon the docks with his infant son, Josiah in her arms. QUINCY, *supra* note 7, at 346-50; *see*

V. CONCLUSION

Today we live in the democracy envisaged by Quincy and his patriot colleagues. It is served and protected by a powerful legal profession. But our profession is torn by doubt and lack of self-respect. Effective representation has come, for some lawyers, to mean, "scorched earth tactics," disrespect for the judicial process, and disrespect for each other.[166] *Quincy's Reports* depicts a small band of lawyers struggling to keep alive a judicial system in the face of imminent civil violence and growing hatred. Patriots and loyalists alike, they saw themselves as sharing a great professional tradition and a devotion to the rule of law. It was a devotion that superceded their politics, their special interests, and even, in Josiah Quincy's case, life itself.

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also supra note 10 and accompanying text (providing overview of Quincy's life). Quincy died carrying oral secrets about support among the "most stanch friendly to America." He observed in his shipboard notes of April 21, 1775:

> It appeared of high importance that the sentiments of such persons should be known in America. To commit their sentiments to writing, was neither practicable nor prudent at this time. To the bosom of a friend they could intrust what might be of great advantage to my country. To me that trust was committed, and I was, immediately upon my arrival, to assemble certain persons, to whom I was to communicate my trust, and had God spared my life, it seems it would have been of great service to my country.

QUINCY, *supra* note 7, at 347.

The date of Quincy's death was April 26, 1775. On April 19, 1775, the fighting began at Lexington and Concord. The infant in Abigail's arms, to become Mayor of Boston and President of Harvard, would eventually carry his mother's body and lay it, 23 years later, beside his father's in the family tomb on March 25, 1798. *See id.* at 353 (listing location of Quincy's and wife's remains).

166. *See ". . . .In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM 1-16 (1986), *reprinted in* 112 F.R.D. 243 (1986). The problem is not going away. *See* William C. Kelly, Jr., *Reflections on Lawyer Morale and Public Service in an Age of Diminishing Expectations*, *in* THE LAW FIRM AND THE PUBLIC GOOD 90-101 (Robert A. Katzmann ed., 1995) (recounting problems occurring in law firms); Darlene Ricker, *Greed, Ignorance and Overbillling*, A.B.A. J., Aug. 1994, at 62, 62-66 (discussing problems with profession); *see also* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 264-69, 343 (1995) (cautioning against over-simplifying solutions while simultaneously acknowledging that problem exists). My approach is set out in two publications. DANIEL R. COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 251-64 (1995); Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1271-77 (1994).